262 N.C. App.—No. 4 Pages 511-709

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 11, 2020

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
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[1]Sworn in 30 April 2019. [2]Sworn in 26 April 2019. [3]Died 28 August 2015. [4]Died 3 May 2015. [5]Died 30 January 2017. [6]Died 4 January 2015. [7]Died 27 January 2015. [8]Died 11 September 2015. [9]Resigned 24 March 2019. [10]Retired 1 April 2019.

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DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Jaye E. Bingham-Hinch

Assistant Director
David Alan Lagos

Staff Attorneys
Bryan A. Meer
Eugene H. Soar
Michael W. Rodgers
Lauren M. Tierney
Carolina Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy

ADMINISTRATIVE OFFICE OF THE COURTS

Director
McKinley Wooten[11]

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Jennifer C. Peterson
Alyssa M. Chen

[11] Appointed 2 March 2020.

COURT OF APPEALS

CASES REPORTED

FILED 4 DECEMBER 2018

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ANIMALS

Lost—dog—adoption—statutory procedure—The trial court's dismissal of plaintiffs' tort claims against defendant for not returning their lost dog was affirmed, where Animal Control satisfied its statutory duty (N.C.G.S. § 19A-32.1) to hold plaintiffs' lost dog for a minimum of 72 hours, after which time plaintiffs lost any ownership rights in the dog and defendant became the dog's lawful owner through a formal adoption. **Lambert v. Morris, 583.**

APPEAL AND ERROR

Waiver—argument—failure to provide support—Respondent mother did not present a meritorious challenge to the trial court's retention of jurisdiction in a juvenile proceeding where she argued that the trial court did not analyze whether the case should have been transferred to a Chapter 50 proceeding but she did not provide support for her assertion. **In re Y.I., 575.**

defendant with the complaint. Private process service is authorized by statute only when the sheriff is unable to fulfill the duties of a process server, a showing not met here. Although plaintiff's process server filed an affidavit pursuant to Rule 4, a self-serving affidavit does not itself create authority for an affiant. **Locklear v. Cummings, 588.**

Rule 53—compulsory referee—adoption of report by trial court—findings and conclusions—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court did not err by adopting the appointed referee's report where the report's findings were sufficiently supported by the evidence and in turn supported the report's conclusions. **Bullock v. Tucker, 511.**

Rule 53—compulsory referee—judicial adoption of report—entry of proper judgment—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court's review and adoption of a report from the appointed referee pursuant to N.C.G.S. § 1A-1, Rule 53, while proper, was incomplete without entry of a proper judgment, and the trial court was directed to do so upon remand. **Bullock v. Tucker, 511.**

Rule 53—compulsory referee—judicial review of report—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court conducted a proper review, pursuant to N.C.G.S. § 1A-1, Rule 53(g)(2), of a report issued by an appointed referee. The record reflects the trial court gave more than a perfunctory examination of the report before adopting it, and defendants' written exception to the report "in its entirety" without reference to specific findings relieved the trial court of the requirement to review the evidentiary sufficiency supporting the report's findings. **Bullock v. Tucker, 511.**

Rule 60(b) relief—modification of prior order—propriety—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the Court of Appeals rejected defendants' argument that the trial court erroneously modified a consent order upon the appointed referee's suggested remedy of Rule 60(b) relief, because the order from which the trial court struck a provision requiring plaintiffs to remove equipment from the lake upon termination of the lease was not entered by consent but upon the court's decision. **Bullock v. Tucker, 511.**

Rule 60(b) relief—striking of specific performance requirement—doctrine of impossibility—In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court did not abuse its discretion by awarding Rule 60(b) relief in the form of striking the requirement from a prior order that plaintiffs be required to remove equipment from the lake upon termination of the parties' lease, since extraordinary circumstances existed which prevented plaintiffs from fulfilling that specific performance. **Bullock v. Tucker, 511.**

CONSPIRACY

Juror harassment—meeting of the minds—sufficiency of evidence—In a prosecution for conspiracy to commit juror harassment, the State presented evidence sufficient to be presented to the jury that defendant and two other individuals shared a mutual, implied understanding to harass jurors outside of a courtroom where all three exhibited parallel, contemporaneous behavior such as pacing in the hallway and physically confronting and directing loud accusations at multiple jurors. **State v. Mylett, 661.**

CONSTITUTIONAL LAW

First Amendment—jury harassment statute—nonexpressive conduct—North Carolina's jury harassment statute, N.C.G.S. § 14-225.2(a)(2), did not trigger First Amendment protections where it restricted nonexpressive conduct that is otherwise proscribable criminal conduct, because the statute prohibited threats and intimidation directed at a juror irrespective of the content. Even assuming the statute implicated the First Amendment, its restrictions were content-neutral and narrowly tailored to serve the significant governmental interest of ensuring that jurors remain free from threats and intimidation, thereby surviving intermediate scrutiny. **State v. Mylett, 661.**

Jury harassment statute—vagueness challenge—notice of proscribed conduct —North Carolina's jury harassment statute, N.C.G.S. § 14-225.2(a)(2), was deemed not unconstitutionally vague because its prohibition against making threats or intimidating jurors was sufficiently specific to put individuals on notice of the proscribed conduct, following prior case law holding that the undefined word "intimidate" in another statute was not unconstitutionally vague. **State v. Mylett, 661.**

Right to speedy trial—Barker factors—63-month delay—late assertion of right—A defendant whose criminal trial was delayed nearly 63 months after his arrest failed to demonstrate a violation of his right to a speedy trial where the delay was caused by a backlog of pending cases in the county and a shortage of assistant district attorneys, defendant continued to petition the court for resources to develop his case for at least 2 years following his arrest, defendant failed to assert his right until almost 5 years after his arrest, and defendant's ability to defend his case was not impaired. **State v. Farmer, 619.**

CRIMINAL LAW

Discovery—blank audio recording—In a prosecution for trafficking methamphetamine, the trial court did not err by denying defendant's motion to dismiss for a violation of his constitutional rights where the State did not preserve or disclose a blank audio recording. An officer did not act in bad faith where he attempted to record a conversation between an informant and defendant setting up a drug transfer, but the recording device was new and the officer was unsuccessful. While the blank audio recording may have had the potential to be favorable, defendant did not demonstrate that it was material. To the extent that the recording implicated credibility, it was the officer's credibility, not the informant's. **State v. Hamilton, 650.**

Jury instructions—request for definition—common usage and meaning—In a prosecution for juror harassment, the trial court was not required to define "intimidate" in instructions to the jury, because it is a word of common usage and meaning that can be reasonably construed and unlikely to confuse a jury. **State v. Mylett, 661.**

Jury instructions—special request—failure to disclose evidence—In a prosecution for trafficking methamphetamine, the trial court did not err by refusing defendant's requested instruction about the State's failure to disclose a blank recording of defendant's conversation with an informant. The officer testified that the recording device was new and that his attempt to make the recording was not successful. Defendant did not establish bad faith by the officer and did not show that the blank audio recording contained any exculpatory evidence. **State v. Hamilton, 650.**

Prosecutor's closing argument—no objection—In a murder trial, where defendant did not object to two statements made by the prosecutor during closing argument, the trial court was not required to intervene ex mero motu when the

which involved "specific instances of conduct" pursuant to Evidence Rule 405(b). Defendant failed to challenge on appeal the trial court's exclusion, pursuant to Evidence Rule 403, of the victim's prior conviction for armed robbery, a decision properly made within the court's discretion. **State v. Greenfield, 631.**

Impeachment evidence—social media post—exclusion—In a juror harassment case, defendant failed to show he was prejudiced by the trial court's decision to exclude a social media post defendant intended to use to impeach a juror-witness who testified he suffered emotional distress after being harassed but which defendant failed to disclose during pretrial discovery. The Court of Appeals rejected defendant's unsupported argument that N.C.G.S. § 15A-905(a) did not apply to impeachment evidence. **State v. Mylett, 661.**

Juror harassment trial—prior fight—hearsay analysis—In a prosecution for juror harassment, the trial court did not err by allowing juror-witnesses to testify regarding a fight involving defendant and his brother that resulted in his brother being tried for assault on a government official (the trial in which the juror-witnesses served on the jury), while excluding defendant's own testimony about that fight. None of the juror-witnesses' testimony constituted improper character evidence, nor hearsay, where it was offered to show their states of mind when defendant confronted them outside the courtroom after his brother's trial. By contrast, defendant's proffered testimony was inadmissible hearsay because he offered it to prove the truth of the matter asserted. **State v. Mylett, 661.**

Medical malpractice—administrative and clinical—hospital accreditation documents—mixed claims—not prejudicial—There was no prejudicial error in a medical malpractice action against a hospital in the admission of some of the hospital's accreditation documents. Although the claim was for both administrative and clinical negligence, and the administrative negligence claim proceeded erroneously, evidence of the defendant's policies and protocols was relevant to establish a standard of care for clinical negligence and defendant did not show that the evidence impacted the verdict on clinical negligence. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth., 526.**

Opinion testimony—detective—whether defendant confessed—In a murder trial, defendant's argument that the trial court committed plain error by allowing a detective to opine that defendant "had already confessed to felony murder" was moot where the Court of Appeals decided to reverse defendant's felony murder conviction on other grounds. Even if not moot, any error did not amount to plain error. **State v. Greenfield, 631.**

HOMICIDE

First-degree felony murder—jury instructions—multiple victims—intended victim—In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI), the trial court committed reversible error in its jury instructions for first-degree felony murder based on AWDWIKISI where the jury marked the verdict sheet finding defendant guilty of both first-degree felony murder and second-degree murder for a single homicide. The jury instructions should have made clear that defendant could be convicted of first-degree felony murder based on AWDWIKISI only if the jury believed the fatal bullet was meant for the second victim, and instead hit the first victim. Neither the jury instructions nor

where decedent did not report to emergency room personnel that EMTs gave him medication on his way to the hospital. There was no evidence that defendant failed to report his symptoms. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth., 526.**

Expert witness—community standard of care—sufficiency of evidence—The trial court did not abuse its discretion in a medical malpractice action by determining that plaintiff's expert qualified as an expert on the community standard of care. North Carolina law does not prescribe a particular method by which a medical doctor must become familiar with the standard of care in a particular community. The expert's testimony here was based on review of a lengthy demographics package, internet research, and the expert's comparison of this community to the Albany Medical Center, where he had practiced and where he taught. Although defendant contended that the evidence was not sufficient to show familiarity with community standards because the expert had never been in the area, had never practiced in North Carolina, held a license in North Carolina, or previously testified in North Carolina, there was precedent holding sufficient similar basis for determining familiarity with the community standard of care. **Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth., 526.**

PARTIES

Standing—real party in interest—condo association—suing on behalf of constituent members—In an action to determine the rights and duties bestowed by an easement, plaintiff condo association qualified as a real party in interest to assert a claim that defendant neighboring homeowners association wrongfully installed a gate card facility on a lot owned by the condo association members in common. The condo association had standing to sue in its own name on behalf of its members where the condo owners were equally affected by the placement of the keypad on their commonly owned lot. **Ocean Point Unit Owners Ass'n, Inc. v. Ocean Isle W. Homeowners Ass'n, Inc., 603.**

PLEADINGS

Notice—identity of subject matter—sufficiency of allegations—In an action to determine the rights and duties bestowed by an easement, plaintiff condo association's allegations were sufficient to put defendant neighboring homeowners association on notice regarding the identity of the card gate facility plaintiff alleged was wrongfully installed by defendant. **Ocean Point Unit Owners Ass'n, Inc. v. Ocean Isle W. Homeowners Ass'n, Inc., 603.**

Rule 9(j) certification—motion to amend—motions to dismiss—In a medical malpractice case, the trial court erred by denying plaintiff's motion to amend her complaint to include the proper Rule 9(j) certification and by dismissing plaintiff's claims. Plaintiff inadvertently used certification language from a prior version of Rule 9(j), and her motion to amend was accompanied by affidavits averring that her experts' review occurred prior to the filing of the original complaint. **Locklear v. Cummings, 588.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

BULLOCK v. TUCKER

[262 N.C. App. 511 (2018)]

PAULA K. BULLOCK AND FYNNMASTER, LLC, PLAINTIFFS
v.
TRENTON GLEN TUCKER, ALLISON C. TUCKER, HOLLIE TUCKER WINTERS, BRIAN KEITH WINTERS, SHARLETTE TUCKER, GLENWOOD TUCKER, TIM RICHARDSON, TUCKER LAKE RECREATIONS, INC., JOHN BEMIS, JEFF ROBERTS, AND JAKUB PILECKY, DEFENDANTS

No. COA17-1429

Filed 4 December 2018

1. Civil Procedure—Rule 53—compulsory referee—judicial review of report

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court conducted a proper review, pursuant to N.C.G.S. § 1A-1, Rule 53(g)(2), of a report issued by an appointed referee. The record reflects the trial court gave more than a perfunctory examination of the report before adopting it, and defendants' written exception to the report "in its entirety" without reference to specific findings relieved the trial court of the requirement to review the evidentiary sufficiency supporting the report's findings.

2. Civil Procedure—Rule 53—compulsory referee—adoption of report by trial court—findings and conclusions

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court did not err by adopting the appointed referee's report where the report's findings were sufficiently supported by the evidence and in turn supported the report's conclusions.

3. Civil Procedure—Rule 60(b) relief—striking of specific performance requirement—doctrine of impossibility

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court did not abuse its discretion by awarding Rule 60(b) relief in the form of striking the requirement from a prior order that plaintiffs be required to remove equipment from the lake upon termination of the parties' lease, since extraordinary circumstances existed which prevented plaintiffs from fulfilling that specific performance.

4. Civil Procedure—Rule 60(b) relief—modification of prior order—propriety

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the Court of Appeals rejected defendants'

argument that the trial court erroneously modified a consent order upon the appointed referee's suggested remedy of Rule 60(b) relief, because the order from which the trial court struck a provision requiring plaintiffs to remove equipment from the lake upon termination of the lease was not entered by consent but upon the court's decision.

5. Civil Procedure—Rule 53—compulsory referee—judicial adoption of report—entry of proper judgment

In protracted litigation regarding a commercial lease at a lake by a waterskiing business, the trial court's review and adoption of a report from the appointed referee pursuant to N.C.G.S. § 1A-1, Rule 53, while proper, was incomplete without entry of a proper judgment, and the trial court was directed to do so upon remand.

Appeal by defendants from order entered 3 August 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Heard in the Court of Appeals 5 September 2018.

Law Offices of F. Bryan Brice, Jr., by F. Bryan Brice, Jr., for plaintiff-appellees.

Daughtry, Woodard, Lawrence & Starling, LLP, by Luther D. Starling, Jr. and W. Joel Starling, Jr., for defendant-appellants.

ELMORE, Judge.

This action arose from the commercial lease of lakefront property at Tucker Lake in Johnston County that began 1 January 2012 and ended 31 December 2016. Lessors Trenton Glen Tucker, Allison C. Tucker, Hollie Tucker Winters, Brian Keith Winters, and Tucker Lake Recreations, Inc., as well as Sharlette Tucker, Glenwood Tucker, and Tim Richardson (collectively, "defendants"), appeal a trial court order that adopted a compulsory referee's report. In its report, the referee recommended that the lessees, Paula K. Bullock and Fynnmaster, LLC (collectively, "plaintiffs"), be awarded Rule 60(b) relief in the form of striking a provision in a 30 April 2014 order that amended the initial lease. That provision provided that "[u]pon termination of the lease, . . . [p]laintiffs shall remove . . . grain bin anchors" they had previously installed in Tucker Lake to support the cable system required to operate their commercial waterskiing enterprise. In its report, the referee found that defendants have thwarted plaintiffs' earnest efforts to remove the anchors since at least October 2016, and concluded that, at the time its report issued one day

before the lease expired, it was now impossible for plaintiffs to comply with this provision of the 30 April 2014 order. After a hearing on defendants' exception to the referee's report, the trial court adopted the report in its entirety. Defendants appeal.

On appeal, defendants contend the trial court's order adopting the referee's report should be reversed because (1) the trial court perfunctorily adopted the report without adequately reviewing the evidentiary sufficiency of the referee's findings; (2) certain findings were unsupported by the evidence and the findings did not support the conclusions; and (3) the Rule 60(b) relief recommended was improper because it (a) was premised on an erroneous conclusion that it was impossible for plaintiffs to perform the anchor-removal requirement of the 30 April 2014 order, and (b) inappropriately modified a material provision of a consent order. Defendants also contend that, even if the trial court did not reversibly err in these respects, (4) the case must be remanded for entry of a proper judgment because the trial court's order merely adopted the referee's report.

We hold that the trial court adequately reviewed defendants' exceptions to the referee's findings and did not err in adopting the report in its entirety. The challenged findings were supported by the evidence, the challenged conclusions were supported by the findings, the 30 April 2014 order amending the initial lease was not a valid consent order, and the Rule 60(b) relief recommended did not amount to an abuse of discretion. Accordingly, we affirm the trial court's order. However, we remand to the trial court with instructions to enter a judgment concordant with that adopted report.

I. Background

On 1 January 2012, plaintiffs entered into a five-year *pro se* commercial lease with defendants Trenton Glen Tucker, Allison C. Tucker, Hollie Tucker Winters, Brian Keith Winters, and Tucker Lake Recreations, Inc., to use a 48-acre parcel of lakefront property at Tucker Lake for plaintiffs' "operations of a water recreation operation including . . . the construction and maintenance of underwater and above water cabling, docks buildings, and related facilities." Soon after, disputes concerning the parties' performances under the lease arose. Although the parties have been actively litigating since April 2012, we limit our discussion of the extensive procedural history to only that relevant to provide context and adjudicate the appeal.

On 3 April 2012, plaintiffs filed a verified complaint against defendants. Plaintiffs asserted claims of breach of contract, civil conspiracy,

tortious interference with contract, and unfair and deceptive trade practices ("UDTP"); sought declaratory judgments as to interpreting certain lease provisions; and sought a temporary restraining order ("TRO") and a preliminary injunction on the grounds that defendants have "frustrate[d their] efforts . . . to construct a cable water skiing facility[.]" On 12 April 2012, defendants cross-moved for a TRO and preliminary injunction, seeking to enjoin plaintiffs from continuing construction. On 26 April 2012, the trial court entered a TRO that, *inter alia*, enjoined defendants from unreasonably interfering with plaintiffs' business plans. Plaintiffs then proceeded with their plan of installing three large grain bin anchors in Tucker Lake to support the cable system required for their waterskiing enterprise.

On 4 June 2012, defendants filed their answer to the complaint, moved under Rule 12(b)(6) to dismiss plaintiffs' claims, and asserted eight affirmative defenses. Defendants also filed a third-party complaint against plaintiffs, and John Bemis, Jeff Roberts, and Jakub Pilecky (collectively, "third-party defendants"). Defendants, as third-party plaintiffs, asserted claims of breach of contract, fraud, trespass to real property, trespass to personal property, civil conspiracy, UDTP, summary ejectment, and assault. After further litigation, likely due to the number of claims and the parties' contentiousness, the trial court on 21 May 2013 entered an order appointing a compulsory referee to, *inter alia*, "resolve any disagreement among the parties relating to the performance of the lease agreement" and "serve until the trial of this action or until further order of the Court." Disputes about the lease and litigation continued.

In mid-January 2014, plaintiffs voluntarily dismissed six of their claims, moved for summary judgment on their three remaining claims seeking declaratory judgments on interpreting certain lease provisions, and moved for summary judgment on all of defendants' claims in their third-party complaint. After a bench trial scheduled for 21 January, the trial court permitted the parties to negotiate outside its presence to reach a resolution of their claims. After a full day of negotiation on 22 January, the parties announced in open court they had reached an agreement, which they requested the trial court adopt as a consent order. The trial court instructed the parties to draft a consent order and reconvene the next day for its entry. But after exchanging several drafts, the parties could not mutually agree to the language of the consent order.

In mid-February 2014, the parties filed cross-motions to enforce the settlement agreement they previously announced to the trial court on 22 January. After a hearing, at which both parties presented their proposed settlement agreements, the trial court entered an order on 30 April

2014 resolving the parties' claims and amending some provisions of the initial lease. In its order, the trial court noted the parties' "ultimate[ ] ineffective work toward" "attempt[ing] to finalize a Consent Order"; elected to "adopt[ ] Plaintiff's Motion and Order, with the addition of [two] paragraphs"; and added the following relevant provision to the lease agreement: "Upon termination of the lease [on 31 December 2016], Plaintiffs shall remove the cable system and grain bin anchors." The parties operated under the modified lease but further disputes arose and litigation continued.

Around 7 October 2016, plaintiffs began removing the cable system attached to the anchors from the premises. On 12 October, defendants moved for a TRO, seeking to enjoin plaintiffs from removing the cable system "while leaving the concrete grain bin anchors for Defendants to deal with later[.]" That same day, the trial court granted the TRO. At a review hearing two days later, evidence was presented that plaintiffs had hired an engineer to develop a plan for removing the anchors; that the engineer had proposed two plans that required lowering the water level of the lake, which plaintiffs had presented to defendants; and that defendants had rejected both proposals on the grounds that they refused to lower the water level due to ecological concerns with the lake.[1] After the hearing, the trial court entered an order on 20 October 2016 dissolving the prior TRO and denying defendants' preliminary injunction motion.

On 26 October 2016, plaintiffs filed a "Motion to Modify Permanent Injunction" in the trial court, requesting that "the requirement to remove the 'grain bin anchors' be stricken from the permanent injunction" of the 30 April 2014 order. Plaintiffs argued that the lease required defendants to "assist [Plaintiffs] in lowering water level for general maintenance of water quality in October of each year" but that defendants "have refused to lower the water level of the lake," which "needs to be lowered at least 15 feet to remove the 'grain bin anchors.' " Therefore, plaintiffs requested, "[d]ue to [defendants'] refusal to lower the water level," the trial court "modify the requirement to remove the 'grain bin anchors.' "

At a 3 November 2016 hearing on plaintiffs' motion, the trial court refused to consider the matter and referred it to the referee. On 15 November, defendants filed their response to plaintiffs' motion to modify the 30 April 2014 order and a request that the referee report on additional lease issues.

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1. Because defendants have only provided 122 of 219 pages of transcript from this hearing, our discussion is limited. *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988) ("It is the appellant's responsibility to make sure that the record on appeal is complete and in proper form." (citation omitted)).

On 30 December 2016, one day before the lease expired, the referee electronically submitted its report to the parties. In its report, the referee found that plaintiffs were ready, willing, and able to comply with the anchor-removal provision, having retained an engineer and having submitted two proposals to remove the anchors to defendants in October 2016. However, defendants rejected both proposals on the grounds that they refused to lower the water level but failed to provide an alternative plan or present evidence to support their rationale that lowering the water level would cause ecological damage to the lake, refused to lower the water level as they had done annually in Octobers past, and moved for a TRO that halted plaintiffs' progress, all of which served to effectively frustrate plaintiffs from complying with the anchor-removal provision of the amended lease. As the lease was set to expire one day after its report issued, the referee concluded it was now impossible for plaintiffs to remove the anchors "[u]pon termination of the lease." The referee determined:

> The plaintiffs cannot be expected to comply with Paragraph 9 of the April 30, 2014 order at this time. The Plaintiffs made a good faith effort to develop and implement a plan to remove the anchors while attempting to balance the environment of the lake with the need to remove the anchors. These efforts have been thwarted by the Defendants who do not want the lake level lowered but who have not offered any alternative plans for consideration nor evidence of potential damages to the lake at the level they believe is likely to occur. With the end of the lease term now upon the parties and the resistance to the Plaintiffs' plan of removal by the Defendants, it has become impossible for the Plaintiffs to fulfill this part of the April 30, 2014 order.

Therefore, the referee recommended that the trial court award plaintiffs relief under Rule 60(b)(6) in the form of striking the provision of the 30 April 2014 order amending the lease that required them to remove the anchors.

On 13 January 2017, defendants filed with the trial court an exception to the referee's report "in its entirety" but did not specifically except to any finding or conclusion. On 28 June, after several continuances, the trial court heard defendants' exception to the referee's report. On 3 August 2017, the trial court entered an order adopting "all findings of fact and conclusions of law" contained in the referee's report. Defendants appeal.

II. Issues Presented

On appeal, defendants assert the trial court erred by (1) "fail[ing] to make a sufficient review of the referee's findings as required by N.C. Gen. Stat. § 1A-1, Rule 53(g)(2)"; and (2) adopting the referee's report because "the referee's findings of fact were not supported by the evidence, and the conclusions of law were not supported by the findings." Additionally, defendants contend, even if the trial court adequately reviewed and properly adopted the report, (3) "the case should still be remanded for entry of a proper judgment."

III. Sufficiency of Review

[1] Defendants first assert the trial court erred by "fail[ing] to make a sufficient review of the referee's findings as required by N.C. Gen. Stat. § 1A-1, Rule 53(g)(2)" on the grounds that the trial court " 'perfunctorily placed the stamp of . . . approval upon the labor of the referee' because the referee's findings were unsupported and contradictory." We disagree.

N.C. Gen. Stat. § 1A-1, Rule 53(g)(2) (2017) governs judicial review of a referee's report and provides in pertinent part: "All or any part of the report may be excepted to by any party . . . . The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions." Ordinarily, where

> exceptions are taken to a referee's findings of fact and law, it is the duty of the [trial] judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot review the referee's findings in any other way.

Quate v. Caudle, 95 N.C. App. 80, 83, 381 S.E.2d 842, 844 (1989) (quoting *Thompson v. Smith*, 156 N.C. 345, 346, 72 S.E. 379, 379 (1911)). However, where a party perfunctorily excepts to a referee's report "in its entirety" and fails to specifically except to any finding, a trial court need not review the evidentiary sufficiency of the referee's findings. *See, e.g.*, *Anderson v. McRae*, 211 N.C. 197, 198, 189 S.E. 639, 640 (1937) ("[I]n the absence of exceptions to the factual findings of a referee, such findings are conclusive, and where no exceptions are filed, the case is to be

determined upon the facts as found by the referee." (citations omitted)); *Chard v. Warren*, 122 N.C. 75, 79, 29 S.E. 373, 374 (1898) ("There was no exception by any of the parties to that finding of the referee, at any time, and it ought to have been confirmed by the court, because there had been no exception filed to the finding of the referee on that point." (citation omitted)).

Here, in their written exception to the referee's report, defendants failed to except to any particular factual finding or legal conclusion made by the referee; rather, they excepted to the referee's report "in its entirety." A careful review of the seventy-two-page transcript of the hearing before the trial court reveals that the only relevant exception defendants took to the referee's findings that they now challenge on appeal concerned its finding about the absence of evidence that the anchors could be removed without lowering the water level of the lake. As no other relevant exceptions were made to the referee's findings, they were binding and the trial court was not required to review them. *Anderson*, 211 N.C. at 198, 189 S.E. at 640 (citations omitted).

We are satisfied by the two-hour hearing on defendant's exception to the referee's report, and by the language in the trial court's order—that it "reviewed in detail the Referee's Report of December 30, 2016, Defendants' exceptions to the same, the case file, briefs and affidavits submitted by counsel, the materials submitted to the referee, [and] prior Orders of this Court"—that the trial court thoughtfully considered defendants' exceptions and did not perfunctorily place a stamp of approval on the referee's labor. Accordingly, we overrule defendants' argument that the trial court inadequately reviewed the referee's findings under Rule 52(g)(2).

IV. Adopting the Referee's Report

[2] Defendants next contend the trial court erred by adopting the referee's report on the grounds that "the referee's findings of fact were not supported by the evidence, and the conclusions of law were not supported by the findings." We disagree.

A. Review Standard

Appellate review of factual findings made by a referee and adopted by the trial court is limited to whether the challenged findings were supported by "any competent evidence." *See Lawson v. Lawson*, 236 N.C. App. 576, 578, 763 S.E.2d 570, 572 (2014) ("In reviewing the trial court's judgment entered on the referee's report, the findings of fact by a referee, approved by the trial [court], are conclusive on appeal if supported

by any competent evidence." (quoting *Cleveland Constr., Inc. v. Ellis-Don Constr., Inc.*, 210 N.C. App. 522, 531–32, 709 S.E.2d 512, 520 (2011)). Challenged legal conclusions are reviewed *de novo*. *Id.* ("Any conclusions of law made by the referee, however, are reviewed *de novo* by the trial court, and the trial court's conclusions are reviewed *de novo* by the appellate court." (quoting *Cleveland Constr.*, 210 N.C. App. at 531–32, 709 S.E.2d at 520)).

B. Findings and Conclusions

Defendants challenge the evidentiary sufficiency of the following purported findings made by the referee and adopted by the trial court: (1) "[t]he testimony of an engineer was that in order to remove the anchors the water level of the lake would need to be lowered"; (2) "[t]here was no showing by the Defendants to the court of any alternative plan for removing the anchors that would not necessitate the lowering of the lake level"; (3) "[p]laintiffs cannot be expected to comply with Paragraph 9 of the April 30, 2014 order at this time"; and (4) "[w]ith the end of the lease term now upon the parties and the resistance to the Plaintiffs' plan of removal by the Defendants, it has become impossible for the Plaintiffs to fulfill this part of the April 30, 2014 order."

As to the first statement, because the recitation of testimony is not a valid finding, *see*, *e.g.*, *In re M.R.D.C.*, 166 N.C. App. 693, 699, 603 S.E.2d 890, 894 (2004) ("Recitations of the testimony of each witness *do not* constitute *findings of fact*[.]" (quoting *Moore v. Moore*, 160 N.C. App. 569, 571–72, 587 S.E.2d 74, 75 (2003)), its evidentiary sufficiency is irrelevant. Nonetheless, we note that despite plaintiffs' engineer during cross-examination at the October 2016 hearing conjuring up a proposal to remove the anchors without lowering the water level of the lake, the two plans he formally proposed required lowering the water level. As to the second, defendants have not lodged a legitimate evidentiary challenge by pointing to evidence that they, indeed, presented a plan for removing the anchors not requiring lowering the water level; rather, they rely solely on plaintiffs' engineer's testimonial proposal that it might be possible the anchors could be so removed. Accordingly, we uphold the finding that *defendants* failed to present evidence of an alternative plan.

As the third and fourth statements are legal conclusions, *see Lamm v. Lamm*, 210 N.C. App. 181, 189, 707 S.E.2d 685, 691 (2011) ("Generally, 'any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified a conclusion of law." (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)), our review on appeal is whether the referee's findings adopted

by the trial court supported these conclusions, *id.* ("A finding of fact that is essentially a conclusion of law will be treated as a fully reviewable conclusion of law on appeal." (citing *M.R.D.C.*, 166 N.C. App. at 697, 603 S.E.2d at 893)). To support these conclusions, the trial court adopted the referee's following relevant findings:

> [A]s early as October 2016 the Plaintiffs were working towards removing the anchors in an effort to comply with Paragraph 9 of the April 30, 2014 order that "[U]pon termination of the lease, the Plaintiffs shall remove the cable system and grain bin anchors." . . .
>
> . . . . The Plaintiffs have employed an engineer to develop a plan for removing the anchors. The engineer has present[ed] two plans to the Plaintiffs . . . each involving the lowering of the lake levels . . . . Before the Plaintiffs [could] proceed with the plan to remove the anchors the Defendants have objected to the removal and the process has come to a halt with a filing of a [TRO] by the Defendants. The Defendants have offered no alternative plan for removing the anchors nor have they offered any independent testimony regarding the harm they believe will occur to the lake with the lowering of the lake level.
>
> The lease now terminates on December 31, 2016. This motion to modify the April 30, 2014 order was filed several days after the Defendants filed for a [TRO]. These filing[s] have delayed the process of removing the anchors prior to the termination of the lease . . . .

These findings, combined with the fact that the referee's report was issued one day before the lease expired, support the challenged conclusions that "Plaintiffs cannot be expected to comply with Paragraph 9 of the April 30, 2014 order *at this time*" and "*[w]ith the end of the lease term now upon the parties* and the resistance to the Plaintiffs' plan of removal by the Defendants, *it has become impossible for the Plaintiffs to fulfill this part of the April 30, 2014 order*." (Emphasis added.) Accordingly, we hold the trial court did not err in adopting the challenged findings and conclusions.

C. Rule 60(b) Relief

[3] Defendants also challenge the recommendation that plaintiffs be awarded Rule 60(b)(6) relief in the form of striking the requirement of the 30 April 2014 order that "[u]pon termination of the lease, the

Plaintiffs shall remove the . . . grain bin anchors." Defendants argue (1) the underlying conclusion that it was impossible for plaintiffs to comply with this requirement was erroneous because "[p]laintiffs' own expert testified it was possible to remove the . . . anchors without draining the lake[,]" and (2) the recommended relief was improper because the 30 April 2014 order was a consent order, and neither the referee nor the trial court had authority to modify a material term of such a consent order. We disagree.

1. Review Standard

We review a trial court's ruling on whether to grant Rule 60(b) relief for abuse of discretion. *See Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) ("[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975))).

2. Grounds for Rule 60(b) Relief

Rule 60(b)(6) authorizes relief from a judgment or order for "[a]ny . . . reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2017). "The test for whether a judgment [or] order . . . should be modified . . . under Rule 60(b)(6) is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted." *Curran v. Barefoot*, 183 N.C. App. 331, 343, 645 S.E.2d 187, 195 (2007) (quoting *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987)). "Exercise of this equitable power is within the full discretion of the trial judge." *N.C. Dep't of Transp. v. Laxmi Hotels of Spring Lake, Inc.*, ___ N.C. App. ___, ___, 817 S.E.2d 62, 71 (2018) (citing *Thacker v. Thacker*, 107 N.C. App. 479, 482, 420 S.E.2d 479, 480 (1992)).

An "extraordinary circumstance . . . exist[s]" and "justice demands" Rule 60(b)(6) relief in the form of modifying a judgment by striking an award of specific performance pursuant to a contract when the movant shows the performance ordered is impossible. *See, e.g.*, *Curran*, 183 N.C. App. at 343, 645 S.E.2d at 195 (holding the trial court erred by denying Rule 60(b)(6) relief in the form of amending a judgment to strike an order of specific performance requiring one party to convey to an adverse party three watercraft the party proved it did not own).

Here, the trial court adopted the following relevant findings and conclusions made by the referee to support awarding Rule 60(b)(6) relief:

> [A]s early as October 2016 the Plaintiffs were working towards removing the anchors in an effort to comply

> with Paragraph 9 of the April 30, 2014 order that "[U]pon termination of the lease, the Plaintiffs shall remove the cable system and grain bin anchors." . . .
>
> . . . . The Plaintiffs have employed an engineer to develop a plan for removing the anchors . . . . Before the Plaintiffs [could] proceed with the plan to remove the anchors the Defendants have objected to the removal and the process has come to a halt with a filing of a [TRO] by the Defendants. The Defendants have offered no alternative plan for removing the anchors nor have they offered any independent testimony regarding the harm they believe will occur to the lake with the lowering of the lake level.
>
> The Plaintiffs made a good faith effort to develop and implement a plan to remove the anchors while attempting to balance the environment of the lake with the need to remove the anchors. These efforts have been thwarted by the Defendants who do not want the lake level lowered but who have not offered any alternative plans for consideration nor evidence of potential damage to the lake at the level they believe is likely to occur. With the end of the lease term now upon the parties and the resistance to the Plaintiffs' plan of removal by the Defendants, it has become impossible for the Plaintiffs to fulfill this part of the April 30, 2014 order.
>
> . . . . The Defendants object to lowering the lake levels and have sought to restrain the Plaintiffs from so doing. Given that the lease will end in one day, the Plaintiffs have been stopped from proceeding with the plan to remove the anchors prior to the termination of the lease and the Defendants have made no offer or an alternative plan for removing the anchors. It is now impossible for the portion of Paragraph 9 of the April 30, 201[4] order to be enforced.

Defendants challenge the conclusion that the plaintiffs' performance of the anchor-removal requirement of the 30 April 2014 order was impossible on the grounds that "[p]laintiffs' own expert testified it was possible to remove the . . . anchors without draining the lake." Contrary to defendants' interpretation, we construe this impossibility-of-performance conclusion not as one grounded in an underlying determination that it was impossible for plaintiffs to "remove the . . . grain

bin anchors" without lowering the water level. Rather, we construe the conclusion as one grounded in an underlying determination that it was now impossible for plaintiffs to remove the anchors "[u]pon termination of the lease" because the lease expired the next day. As the referee and trial court correctly concluded, the doctrine of impossibility operated to excuse plaintiffs' from further performing this provision of the modified lease. By the time the referee issued its 30 December 2016 report, it had become impossible for plaintiffs to remove the anchors "[u]pon [the 31 December 2016] termination of the lease."

Further, the lease provided that "[defendants] agree[ ] to assist [plaintiffs] in lowering water level for general maintenance of water quality in October of each year," and the referee made the following relevant unchallenged findings: (1) "Defendants . . . knew that anchors would need to be removed as this was made a part of the [30 April 2014] order"; (2) "the water levels of the lake are annually lowered during the months of September to December"; (3) "[a]t the time the [30 April 2014] order was entered . . . [it] did not place any restrictions on or address the lowering of the lake level as it was regular practice to lower the lake"; (4) "[p]laintiffs now come to the point in time that the lake level is usually lowered" and "have employed an engineer to develop a plan for removing the anchors," who "present[ed] two plans . . . involving . . . lowering . . . the lake levels"; (5) "[d]efendants have objected to the removal and the process has come to a halt with a filing of a [TRO] by the [d]efendants"; (6) this "filing [has] delayed the process of removing the anchors prior to the termination of the lease"; (7) "[p]laintiffs made a good faith effort to develop and implement a plan to remove the anchors" but their "efforts have been thwarted by the [d]efendants who do not want the lake level lowered but who have not offered any alternative plans"; (8) "[t]here is nothing in the record to indicate that at the time the [30 April 2014 order] was entered the [d]efendants would later raise an objection to the lowering of the water level to remove the anchors at the termination of the lease as the water level of the lake was known to be lowered annually by all parties"; and (9) "[d]efendants object to lowering the lake levels and have sought to restrain the [p]laintiffs from so doing."

These unchallenged findings adopted by the trial court establish, alternatively, that plaintiffs made a sufficient showing that defendants effectively prevented them from removing the anchors "[u]pon termination of the lease." *See Harwood v. Shoe*, 141 N.C. 161, 163, 53 S.E. 616, 616 (1906) ("It is a salutary rule of law that one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the nonperformance.");

see also Goldston Bros. v. Newkirk, 233 N.C. 428, 432, 64 S.E.2d 424, 427 (1951) ("As a general rule, prevention by one party excuses nonperformance of an antecedent obligation by the adversary party, and ordinarily the party whose performance is thus prevented is discharged from further performance[.]").

Accordingly, we conclude that the findings established "extraordinary circumstances . . . exist[ed]" based on defendants' refusing to annually lower the water level and rejecting plaintiffs' proposals to remove the anchors, and that plaintiffs showed "justice demands that relief be granted" from enforcing the modified lease requirement that they remove the anchors "[u]pon termination of the lease" based upon the doctrines of impossibility and/or prevention. Accordingly, we hold the trial court did not abuse its discretion in determining plaintiffs are entitled to relief under Rule 60(b)(6) of striking this requirement from the 30 April 2014 order.

3. Application of Rule 60(b) Relief to Settlement Agreement

[4] Defendants also assert the challenged Rule 60(b) relief recommended was improper because the 30 April 2014 order represented the parties' settlement agreement, and Rule 60(b) provides no authority to modify material terms of such a consent order or judgment. Because we conclude the 30 April 2014 order was not entered by consent, we overrule this argument.

In the 30 April 2014 order, the trial court made the following unchallenged findings:

> 3. The parties, after a full day of settlement negotiations [on 22 January 2014] outside the presence of the Court, informed the Court in chambers of a settlement.
>
> 4. All parties . . . with their attorneys appeared before the Court in open session and recited for the record the terms of a settlement agreeable to all parties hereto . . . .
>
> . . . .
>
> 6. The parties . . . consented to and agreed upon the terms as being entered pursuant to this Order [.] . . .
>
> 7. *After further hearings or appearances before this Court, significant discussion and correspondence among the parties' counsel, attempts to finalize a Consent Order, and ultimately ineffective work toward that end,*

> *Plaintiffs and Defendants filed separate motions to Enforce the Settlement Agreement.*
>
> 8. *The Court adopts Plaintiffs Motion and Order, with the addition of the paragraph 8, and 17, herein.*

(Emphasis added.) As reflected, although the parties after negotiating on 22 January 2014 announced in open court they had reached a settlement agreement, they were unable to agree to the terms of a consent order. Rather, both parties later moved to enforce the settlement agreement and, at the hearing on the motions, both parties presented their proposed settlement agreements to the trial court. The trial court's 30 April 2014 order adopted plaintiffs' proposed agreement but added two other paragraphs. This establishes that the order was contested at least by defendants and was therefore not entered by consent. Further, contrary to the styling of plaintiffs' proposed settlement agreement as "Consent Order," the 30 April 2014 order was styled merely as "Order"; and only the trial judge, not the parties, signed the order. As the 30 April 2014 order was not a consent order, we overrule this argument.

V. Entry of Proper Judgment

[5] Last, defendants contend that even if the trial court's review and adoption of the referee's report did not amount to reversible error, the case must be remanded for entry of a proper judgment. We agree.

Under North Carolina Civil Procedure Rule 53(g)(2), "[n]o judgment may be rendered on any reference except by the judge." N.C. Gen. Stat. § 1A-1, Rule 53(g)(2). Where, as here, a trial court adopts a referee's report without entering a judgment, the appropriate disposition is to remand the case for entry of a judgment in accordance with the approved referee's report. *See Morpul, Inc. v. Mayo Knitting Mill, Inc.*, 265 N.C. 257, 268, 143 S.E.2d 707, 716 (1965) ("We note, however, that [the trial judge], with the exception of the one item of cost, merely affirmed, *ipsis verbis*, the referee's report, without entering any judgment upon it. But the parties have treated his order as a judgment, and, to dispose of the appeal, so do we. The case is remanded to the Superior Court for judgment in accordance with the report as amended by [the trial judge]."); *see also Rouse v. Wheeler*, 17 N.C. App. 422, 427, 194 S.E.2d 555, 558 (1973) ("We find no error in the order of approval and confirmation [of the referee's report] by [the trial judge]. However, in view of the fact that [the trial judge] did not enter a [j]udgment based on the approved findings of fact and conclusions of law other than to make an allowance for the referee's fee, this cause is remanded to the superior court with directions that a proper judgment be entered herein."). Accordingly, we

remand this matter to the trial court with instructions to enter a proper judgment in accordance with the adopted referee's report.

VI. Conclusion

The trial court adequately reviewed defendants' exceptions to the referee's findings. The challenged findings were supported by competent evidence, the challenged conclusions were supported by the findings, and the trial court did not abuse its discretion in ultimately determining that plaintiffs should be awarded relief under Rule 60(b)(6) in the form of striking the requirement of the 30 April 2014 order that "[u]pon termination of the lease, Plaintiffs shall . . . remove the grain bin anchors." Accordingly, we affirm the trial court's order adopting the referee's report. However, we remand this matter to the trial court with instructions to enter a proper judgment concordant with that report.

AFFIRMED AND REMANDED.

Judges DILLON and DAVIS concur.

THE ESTATE OF ANTHONY LAWRENCE SAVINO, PLAINTIFF
v.
THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, A NORTH CAROLINA HOSPITAL AUTHORITY, D/B/A CAROLINAS HEALTHCARE SYSTEM AND CMC-NORTHEAST, DEFENDANT

No. COA17-1335

Filed 4 December 2018

1. Medical Malpractice—administrative negligence—pleadings

The trial court erred by allowing plaintiff to proceed on an administrative negligence theory in a medical malpractice case where the issue was the sufficiency of the pleading. The definition of "medical malpractice action" has been expanded to include the breach of administrative or corporate duties by hospitals and there are two kinds of corporate negligence claim: negligence in clinical or medical care and negligence in the administration or management of the hospital. The negligence allegations in this case were not sufficient to put defendant on notice of a claim of administrative negligence.

2. Statutes of Limitation and Repose—medical malpractice—refiled complaint—relation back

A negligence claim against a hospital arising from the emergency room treatment of a decedent was barred by the statute of limitations, regardless of whether plaintiff pleaded wrongful death in addition to medical malpractice, where both limitations periods expired prior to plaintiff refiling a voluntarily dismissed claim. Relation-back applies only to those claims in the second complaint that were included in the voluntarily dismissed complaint. Medical or clinical negligence and administrative negligence are distinct claims and any administrative negligence claim in the second complaint did not relate back because there were no allegations of breaches of administrative duties in the first complaint.

3. Medical Malpractice—expert witness—community standard of care—sufficiency of evidence

The trial court did not abuse its discretion in a medical malpractice action by determining that plaintiff's expert qualified as an expert on the community standard of care. North Carolina law does not prescribe a particular method by which a medical doctor must become familiar with the standard of care in a particular community. The expert's testimony here was based on review of a lengthy demographics package, internet research, and the expert's comparison of this community to the Albany Medical Center, where he had practiced and where he taught. Although defendant contended that the evidence was not sufficient to show familiarity with community standards because the expert had never been in the area, had never practiced in North Carolina, held a license in North Carolina, or previously testified in North Carolina, there was precedent holding sufficient similar basis for determining familiarity with the community standard of care.

4. Medical Malpractice—administrative and medical negligence—instructions—JNOV on administrative negligence improperly denied

In a medical malpractice action involving both administrative and medical or clinical negligence in which a JNOV was improperly denied on administrative negligence, defendant did not show that the error impacted the jury instructions to its detriment. The instructions used "implement" and "follow" in regard to protocols, but the two terms were not synonymous in this case. However, considered in their entirety, the instructions were not likely to mislead the jury because there was ample evidence that defendant failed to

follow its policies and that the attending emergency room nurse did not collect or communicate pertinent medical information.

5. Evidence—medical malpractice—administrative and clinical—hospital accreditation documents—mixed claims—not prejudicial

There was no prejudicial error in a medical malpractice action against a hospital in the admission of some of the hospital's accreditation documents. Although the claim was for both administrative and clinical negligence, and the administrative negligence claim proceeded erroneously, evidence of the defendant's policies and protocols was relevant to establish a standard of care for clinical negligence and defendant did not show that the evidence impacted the verdict on clinical negligence.

6. Damages and Remedies—pain and suffering—medical malpractice

An award for pain and suffering in a medical malpractice action against a hospital was remanded for a new trial where a doctor testified that a decedent who had suffered chest pain earlier in the day more likely than not suffered pain at home before dying. Where the only evidence was that it was likely that decedent experienced pain because he had previously experienced chest pain, the evidence was insufficient to establish damages for pain and suffering to a reasonable degree of certainty. However, the jury only separated the damages into economic and non-economic categories and it was impossible to determine which portion of the award was for pain and suffering. The matter was remanded for a new trial on the issue of non-economic damages.

7. Medical Malpractice—contributory negligence—not reporting EMT treatment to emergency room personnel

The trial court did not err in a medical malpractice action against a hospital by granting plaintiff's motion for a directed verdict on contributory negligence where decedent did not report to emergency room personnel that EMTs gave him medication on his way to the hospital. There was no evidence that defendant failed to report his symptoms.

Judge MURPHY concurs in the result only.

Appeal by defendant from judgment entered 8 December 2016 and orders entered 19 January 2017 by Judge Julia Lynn Gullett in Cabarrus County Superior Court. Heard in the Court of Appeals 5 June 2018.

Zaytoun Law Firm, PLLC, by Matthew D. Ballew, Robert E. Zaytoun, and John R. Taylor, and Brown, Moore & Associates, PLLC, by R. Kent Brown, Jon R. Moore, and Paige L. Pahlke, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, and Matthew W. Krueger-Andes, and Horack, Talley, Pharr & Lowndes, P.A., by Kimberly Sullivan, for defendant-appellant.

Bradley Arant Boult Cummings LLP, by Robert R. Marcus, for defendant-appellant.

ARROWOOD, Judge.

The Charlotte-Mecklenburg Hospital Authority ("defendant"), d/b/a Carolinas Healthcare System and CMC-Northeast, appeals from judgment in favor of the Estate of Anthony Lawrence Savino ("plaintiff") and orders denying motions for a judgment notwithstanding the verdict ("JNOV") or for a new trial. For the following reasons, we reverse in part, vacate in part, and grant a new trial on non-economic damages.

I. Background

Anthony Lawrence Savino ("decedent") died on the evening of 30 April 2012 after receiving medical treatment at CMC-Northeast earlier that afternoon in response to complaints of chest pain, a headache, dizziness, and numbness and tingling in his arms and hands.

Specifically, Cabarrus County EMS responded to an emergency call regarding decedent's report of chest pain at approximately 1:32 p.m. on 30 April 2012. While transporting decedent to CMC-Northeast, EMS treated decedent with aspirin and a nitroglycerin tablet to relieve his chest pain. Decedent arrived at CMC-Northeast at approximately 2:22 p.m. The admitting nurse at CMC-Northeast was told verbally by the EMT of EMS's treatment and the admitting nurse signed an "EMS Snapshot" that detailed EMS's treatment. The admitting nurse recorded decedent's complaints into his medical chart. Decedent was then examined by an emergency department physician who reviewed decedent's medical chart. The admitting nurse did not relay to the emergency department physician the information provided by the EMT or included in the "EMS Snapshot." The emergency room physician documented decedent's complaints and ordered diagnostic tests. Results of decedent's lab work were not unusual, leading the physician to report a "negative cardiac work-up." Decedent was discharged at approximately 5:31 p.m. with

instructions to follow-up with his primary care physician. Hours later, at approximately 10:58 p.m., decedent's widow found him unresponsive and immediately called EMS. Resuscitation efforts were unsuccessful and decedent was pronounced dead at the scene.

Almost two years after decedent's death, plaintiff and decedent's widow filed an initial "Complaint for Medical Negligence" on 23 April 2014 against defendant, the attending emergency room physician, and the attending emergency room physician's practice (the "2014 Complaint"). Defendant filed an answer with affirmative defenses and a declaration not to arbitrate on 3 July 2014.

On 6 January 2016, plaintiff filed a motion for leave to amend the 2014 Complaint "to conform to the evidence presented to date" "out of an abundance of caution[.]" Plaintiff then filed a withdrawal of the motion for leave to amend the complaint on 15 January 2016, followed by a notice of voluntary dismissal as to all parties without prejudice to refile against defendant only on 19 January 2016. Plaintiff and decedent's widow refiled a "Complaint for Medical Negligence" against defendant on 1 February 2016 (the "2016 Complaint"); the attending emergency room physician and the physician's practice were no longer named as defendants.[1] Defendant filed an answer with affirmative defenses and a declaration not to arbitrate on 5 April 2016.

The case was tried before a jury in Cabarrus County Superior Court, the Honorable Julia Lynn Gullett presiding, between 24 October 2016 and 15 November 2016.

A disagreement between the parties arose during the trial court's consideration of pretrial motions when plaintiff asserted that "obviously this is a medical negligence case" and explained that "there's basically two contentions of negligence in this case[.]" Plaintiff then asserted that it was proceeding on both theories–negligence in the provision of medical care and negligence in the performance of administrative duties. Defendant disagreed that there were two theories of negligence in this case, asserting "[t]he complaint only alleges one theory of negligence."

The parties continued to argue over this issue throughout the hearing of pretrial motions and the trial. Defendant consistently maintained that plaintiff did not plead a claim for administrative negligence. Plaintiff argued its general negligence allegations pleaded in the 2016 Complaint were sufficient to assert both theories of negligence and

1. It appears that, at some point prior to the case being tried, decedent's widow was dismissed from the action as her name does not appear on the judgment or orders.

that defendant was on notice of the administrative negligence claim from plaintiff's designation of experts. The trial court allowed plaintiff to proceed on both negligence theories.

At the close of plaintiff's evidence, defendant moved for a directed verdict. Among the grounds argued, defendant claimed plaintiff did not plead an administrative negligence claim and that, to the extent the paragraphs added to the 2016 Complaint alleged administrative negligence, those portions were barred by the statute of limitations. The trial court denied defendant's motion for a directed verdict without hearing argument from the plaintiff. Defendant later filed a renewed motion for a directed verdict at the close of all the evidence on 10 November 2016. In the motion, defendant asserted there was insufficient evidence and that any claim for administrative negligence should be dismissed because it is barred by the statute of limitations. The trial court again denied defendant's motion.

On 15 November 2016, the jury returned verdicts finding decedent's death was caused by defendant's negligent provision of medical care and defendant's negligent performance of administrative duties. The jury found that plaintiff was entitled to $680,000.00 in economic damages and $5,500,000.00 in non-economic damages. The jury also found that defendant's provision of medical care and defendant's performance of administrative duties were both in reckless disregard to the rights and safety of others.

On 8 December 2016, the trial court entered judgment on the jury verdicts awarding plaintiff $6,130,000.00 in total damages, plus pre- and post-judgment interest as allowed by law. On 12 December 2016, the trial court entered an additional order for costs awarding plaintiff $417,847.15 in pre-judgment interest and $15,571.35 in costs.

Following the entry of judgment, on 16 December 2016, defendant filed a motion for a "JNOV" or for a new trial pursuant to Rule 50(b)(1) and Rule 59 of the North Carolina Rules of Civil Procedure. Defendant moved the court to

> set aside the Verdict of the Jury and the Judgment entered thereon and to enter Judgment in accordance with the Defendant's Motion for Directed Verdict submitted and argued by the Defendant at the close of the evidence offered by the Plaintiff and renewed at the close of all the evidence, or in the alternative, for a new trial on all issues, or in the alternative, for remittitur.

The motions were heard before Judge Gullett in Cabarrus County Superior Court on 19 January 2017 and the trial court entered separate orders denying defendant's motions for a JNOV and a new trial that same day.

On 7 February 2017, defendant filed notice of appeal to this Court from the 8 December 2016 judgment and the 19 January 2017 orders.

II. Discussion

Defendant's primary arguments on appeal concern the trial court's denial of its motion for a JNOV on the administrative negligence and medical negligence claims. Alternatively, defendant argues the trial court erred in allowing the jury to award damages for pain and suffering and in granting plaintiff's motion for a directed verdict on defendant's contributory negligence defense.

1. JNOV

Defendant contends the trial court erred in denying its motion for a JNOV because (1) plaintiff failed to plead a claim for administrative negligence, (2) any claim pleaded in the 2016 Complaint for administrative negligence was barred by the applicable statute of limitations, and (3) plaintiff did not present sufficient evidence of either administrative negligence or medical negligence.

Generally, a motion for a directed verdict or for a JNOV raises the issue of the legal sufficiency of the evidence. Thus, our appellate courts have explained that, "[o]n appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). Because of this high standard, "[our Supreme Court] has . . . held that a motion for judgment notwithstanding the verdict is cautiously and

sparingly granted." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985).

"[Q]uestions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict present an issue of law[.] On appeal, this Court thus reviews an order ruling on a motion for directed verdict or judgment notwithstanding the verdict *de novo*." *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 341-42, 658 S.E.2d 1, 4 (internal quotation marks and citation omitted), *disc. review denied*, 362 N.C. 469, 665 S.E.2d 737 (2008). "Therefore, we consider the matter anew and . . . freely substitute our judgment for that of the trial court regardless of whether the trial court made findings of fact and conclusions of law." *Hodgson Const., Inc. v. Howard*, 187 N.C. App. 408, 412, 654 S.E.2d 7, 11 (2007) (internal quotation marks and citation omitted), *disc. review denied*, 362 N.C. 509, 668 S.E.2d 28 (2008).

A directed verdict or a JNOV is also appropriate if an affirmative defense is established as a matter of law and there are no issues to be decided by the jury. *See Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 341, 427 S.E.2d 149, 152 (1993) (addressing a statute of limitations argument in a breach of contract case). We review those questions of law which establish bases for a directed verdict or a JNOV *de novo*.

A. Administrative Negligence

[1] Defendant's first argument on appeal is that the trial court erred in denying its motion for a JNOV on the administrative negligence claim because the claim was not pleaded in plaintiff's complaint. Consequently, defendant contends the trial court should not have allowed plaintiff to proceed on the administrative negligence claim at trial. Plaintiff contends "corporate negligence" was pleaded all along.

Rule 8 of the North Carolina Rules of Civil Procedure outlines the general rules of pleadings. It provides as follows:

> A pleading which sets forth a claim for relief . . . shall contain
>
> (1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and
>
> (2) A demand for judgment for the relief to which he deems himself entitled. . . .

N.C. Gen. Stat. § 1A-1, Rule 8(a) (2017). Rule 8 further provides that "[n]o technical forms of pleading . . . are required" and that "[e]ach averment of a pleading shall be simple, concise, and direct." N.C. Gen. Stat. § 1A-1, Rule 8(e)(1). Lastly, "[a]ll pleadings shall be so construed as to do substantial justice." N.C. Gen. Stat. § 1A-1, Rule 8(f).

This Court has described the general standard for civil pleadings under Rule 8 as "notice pleading." That is, "[p]leadings should be construed liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial." *Haynie v. Cobb*, 207 N.C. App. 143, 148-49, 698 S.E.2d 194, 198 (2010) (internal quotation marks and citation omitted). "As we have consistently held, the policy behind notice pleading is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleading." *Ellison v. Ramos*, 130 N.C. App. 389, 395, 502 S.E.2d 891, 895, *disc. review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim . . . ." *Highland Paving Co., LLC v. First Bank*, 227 N.C. App. 36, 44, 742 S.E.2d 287, 293 (2013) (internal quotation marks and citation omitted).

The question raised by defendant's first argument on appeal is whether plaintiff sufficiently pleaded a medical malpractice claim for administrative negligence to put defendant on notice of the claim. We hold plaintiff did not sufficiently plead administrative negligence.

As detailed above, two complaints were filed in this case. For purposes of addressing the sufficiency of the pleadings, it is plaintiff's 2016 Complaint that is relevant to our analysis. The parties, however, also refer to both the 2014 Complaint and plaintiff's motion to amend the 2014 Complaint in support of their respective arguments regarding whether the 2016 Complaint sufficiently pleaded administrative negligence. Specifically, defendant contends that all of the allegations of negligence pleaded in the 2016 Complaint and the 2014 Complaint focused exclusively on the clinical care provided by defendant to decedent. Consequently, defendant contends plaintiff asserted a medical negligence claim but not an administrative negligence claim.

Instead of responding to defendant's distinction between medical negligence claims and administrative negligence claims, plaintiff spends the majority of its response asserting that both the 2016 Complaint and 2014 Complaint sufficiently allege "corporate negligence." Citing *Estate of Ray v. Forgy*, 227 N.C. App. 24, 744 S.E.2d 468, *disc. review denied*,

367 N.C. 271, 752 S.E.2d 475 (2013), plaintiff acknowledges that " '[t]here are fundamentally two kinds of [corporate negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital.' " 227 N.C. App. at 29, 744 S.E.2d at 471 (quoting *Estate of Waters v. Jarman*, 144 N.C. App. 98, 101, 547 S.E.2d 142, 144, *disc. review denied*, 354 N.C. 68, 553 S.E.2d 213 (2001)). Nevertheless, plaintiff's argument does not focus on whether it has pleaded a claim for administrative negligence. Plaintiff instead argues that, "under North Carolina law, to state a valid claim for corporate negligence, a plaintiff need only allege the hospital breached the applicable standard of care based on any one of the many clinical *or* administrative duties owed by the hospital." (Emphasis in plaintiff's argument). During oral argument before this Court, plaintiff consistently repeated its argument that it sufficiently pleaded "corporate negligence."

It is not clear from plaintiff's argument on appeal whether plaintiff fully comprehends defendant's argument or the distinction between types of medical malpractice actions in N.C. Gen. Stat. § 90-21.11.

Prior to 2011, "medical malpractice action" was defined in our General Statutes as a "civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2009). The term "health care provider" was defined to include a hospital. *Id*. Applying these definitions, this Court recognized that a hospital could be held liable for medical malpractice where claims of corporate negligence arose out of clinical care provided by the hospital to a patient. *Estate of Water*s, 144 N.C. App. at 101, 547 S.E.2d at 144-45.

In 2011, the General Assembly expanded the definition of "medical malpractice action" in N.C. Gen. Stat. § 90-21.11 to include civil actions against a hospital for damages for personal injury or death arising out of the hospital's breach of administrative or corporate duties to patients. *See* 2011 N.C. Sess. Laws ch. 400, § 5 (retaining the previous definition outlining medical negligence claims as subdivision (a) and adding subdivision (b) to incorporate administrative negligence claims). In full, the definition of "medical malpractice action" in N.C. Gen. Stat. § 90-21.11 now includes either of the following:

> a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.

> b. A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C. Gen. Stat. § 90-21.11(2) (2017). The term "health care provider" continues to include a hospital following the amendments. *See* N.C. Gen. Stat. § 90-21.11(1)(b).

This appears to be the first case deciding the pleading requirements for administrative negligence as a malpractice action following the 2011 amendments to the statute. However, we do not perceive that the legislature intended to create a new cause of action by the 2011 amendment, but rather intended to re-classify administrative negligence claims against a hospital as a medical malpractice action so that they must meet the pleading requirements of a medical malpractice action rather than under a general negligence theory.

Upon review of the amended N.C. Gen. Stat. § 90-21.11, we now reiterate what plaintiff has acknowledged this Court explained in *Estate of Ray*, "[t]here are fundamentally two kinds of [corporate negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital." 227 N.C. App. at 29, 744 S.E.2d at 471 (internal quotation marks and citations omitted). Following the 2011 amendments to N.C. Gen. Stat. § 90-21.11, both types of corporate negligence claims are considered medical malpractice actions.

In this case, defendant's argument is not that plaintiff failed to allege corporate negligence, as plaintiff frames the issue in its response. Defendant contends only that plaintiff failed to allege breaches of administrative duties necessary to plead an administrative negligence claim under N.C. Gen. Stat. § 90-21.11(2)(b).

This Court has explained that

> [a] plaintiff in a medical malpractice action may proceed against a hospital . . . under two separate and distinct theories-*respondeat superior* (charging it with vicarious

> liability for the negligence of its employees, servants or agents), or *corporate negligence* (charging the hospital with liability for its employees' violations of duties owed directly from the hospital to the patient)."

Clark v. Perry, 114 N.C. App. 297, 311-12, 442 S.E.2d 57, 65 (1994) (internal citations omitted) (emphasis in original). In the 2016 Complaint, plaintiff makes clear in paragraph 3 that

> [a]ll allegations contained herein against said corporation also refer to and include the principals, agents, employees and/or servants of said corporation, either directly or vicariously, under the principles of corporate liability, apparent authority, agency, ostensible agency and/or respondeat superior and that all acts, practices and omissions of [d]efendant's employees are imputed to their employer, [defendant].

Plaintiff then summarizes the "medical events occasioning [the] Complaint" in paragraph 6 and specifically identifies the following alleged negligent acts of defendant in paragraph 7:

> Defendant, including by and through its agents, servants and assigns, including its nursing staff, was negligent in its care of [decedent] in that it, among other things:
>
> a. Failed to timely and adequately assess, diagnose, monitor and treat the conditions of [decedent] so as to render appropriate medical diagnosis and treatment of his symptoms;
>
> b. Failed to properly advise [decedent] of additional medical and pharmaceutical courses that were appropriate and should have been considered, utilized, and employed to treat [decedent's] medical condition prior to discharge;
>
> c. Failed to timely obtain, utilize and employ proper, complete and thorough diagnostic procedures in the delivery of appropriate medical care to [decedent];
>
> d. Failed to exercise due care, caution and circumspection in the diagnosis of the problems presented by [decedent];

e. Failed to exercise due care, caution and circumspection in the delivery of medical and nursing care to [decedent];

f. Failed to adequately evaluate [decedent's] response/lack of response to treatment and report findings;

g. Failed to follow accepted standards of medical care in the delivery of care to [decedent];

h. Failed to use their best judgment in the care and treatment of [decedent];

i. Failed to exercise reasonable care and diligence in the application of his/her/their knowledge and skill to [decedent's] care;

j. Failed to recognize, appreciate and/or react to the medical status of [decedent] and to initiate timely and appropriate intervention, including but not limited to medical testing, physical examination and/or appropriate medical consultation;

k. Failed to use their best judgment in the care and treatment of [decedent];

l. Failed to provide health care in accordance with the standards of practice among members of the same health care professions with similar training and experience situated in the same or similar communities at the time the health care was rendered to [decedent.]

These allegations of negligent acts mirror the allegations in the 2014 Complaint.

It is evident from a review of these allegations that the allegations identify failures in the clinical care, either diagnosis or treatment, provided to decedent by defendant by and thru its employees. The allegations do not implicate defendant's administrative duties.

In addition to arguing that the above allegations put defendant on notice of "corporate negligence" claims, plaintiff contends the 2016 Complaint "went further" than the 2014 Complaint "by alleging [d]efendant had Chest Pain Center protocols reflecting the standard of care that were not followed[.]" The three factual allegations included in paragraph 6 of the 2016 Complaint that were absent from the corresponding section of the 2014 Complaint are as follows:

l. Prior to the above events, [defendant] had submitted an application to the Society of Chest Pain Centers (a/k/a the Society for Cardiovascular Patient Care) for CMC-Northeast to gain for [sic] accreditation as a Chest Pain Center and was approved for such accreditation at the time of the events complained of.

m. As part of the Society of Chest Pain Centers accreditation process [defendant] had submitted an application to the Society of Chest Pain Centers that it employed certain protocols, clinical practice guidelines and procedures in the care of patients presenting with chest pain complaints.

n. The protocols, clinical practice guidelines and procedures contained in the CMC-North[e]ast accreditation application replicated the existing standards of practice for medical providers and hospitals in the same care profession with similar training and experience situated in the same or similar communities with similar resources at the time of the alleged events giving rise to this cause of action.

Although the development, implementation, and review of protocols, practice guidelines, and procedures for purposes of accreditation implicate defendant's administrative duties, plaintiff did not include any allegations of negligence associated with those duties in the 2016 Complaint. As stated above, the negligent acts alleged in the 2016 Complaint are the same as those included in the 2014 Complaint, which did not include the factual allegations regarding defendant's administrative duties related to accreditation as a Chest Pain Center.

Plaintiff asserts that the negligence allegation in paragraph 7(l) of the 2016 Complaint, when read in conjunction with the factual allegations about the Chest Pain Center application and accreditation, is sufficient to put defendant on notice of any corporate negligence claims. Again, we disagree. Something more specific is necessary to put defendant on notice of an administrative negligence claim.

Paragraph 7(l) is a general allegation that defendant failed to provide health care in accordance with the standards of practice. The failure to follow protocols in this instance goes to the clinical care provided to decedent. The standards of health care for medical negligence and administrative negligence claims are set forth in N.C. Gen. Stat. § 90-21.12(a). Although the standards outlined in N.C. Gen. Stat.

§ 90-21.12(a) for medical negligence claims under N.C. Gen. Stat. § 90-21.11(2)(a) ("the *care* of such health care provider was not in accordance with the standards of practice among *members of the same health care profession with similar training and experience* situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action") and administrative negligence claims under N.C. Gen. Stat. § 90-21.11(2)(b) ("the *action or inaction* of such health care provider was not in accordance with the standards of practice among *similar health care providers* situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action") are similar, there are differences. (Emphasis on differences added). Paragraph 7(l) refers to care provided by defendant falling below "the standards of practice among members of the same health care professions with similar training and experience[,]" in keeping with the standard of health care for medical negligence provided in N.C. Gen. Stat. § 90-21.12(a).

We further note that this is not a case where it appears plaintiff did not understand how to plead an administrative negligence claim. It is clear from plaintiff's motion for leave to amend the 2014 Complaint and the attached proposed amended complaint filed on 6 January 2016 that plaintiff knew how to plead an administrative negligence claim. In those filings, plaintiff sought to add the following allegations to the negligent acts already listed in the 2014 Complaint:

> m. Failed to provide and/or require adequate training, instruction, monitoring, compliance, coordination among providers, and supervision of its employees and contracted medical staff members concerning utilization, implementation, and compliance with its written protocols, standing orders, guidelines, procedures, and/or policies.
>
> n. Failed to enforce and/or follow its written protocols, standing orders, guidelines, procedures and/or policies.
>
> o. Failed to establish, design, and implement clear, explicit and effective protocols, standing orders, guidelines, procedures and/or policies relating to communication among employees, contracted medical staff members, and EMS personnel.
>
> p. Failed to properly train, supervise, restrict, and monitor emergency department personnel with

known impairments critical to job performance and patient care.

q. Failed to establish, design, and implement clear, explicit, and effective written protocols, standing orders, guidelines, procedures and/or policies to ensure immediate collection, transfer to treating medical providers, availability, and retention of verbal and written information provided by EMS personnel.

r. Misled the consuming public and EMS personnel thus causing injury to . . . decedent by holding itself out to be a chest pain center and failing to follow its stated ACS protocol for patients in the emergency department.

These proposed amendments to plaintiff's 2014 Complaint clearly allege administrative negligence by defendant and are the type of allegations necessary to plead an administrative negligence claim. However, plaintiff withdrew the motion for leave to amend the 2014 Complaint, took a voluntary dismissal on the 2014 Complaint, and did not plead any of these allegations of administrative negligence in the 2016 Complaint.

Plaintiff also asserts that, apart from the 2016 Complaint, discovery requests served after the 2014 Complaint and a supplemental designation of experts put defendant on notice of the administrative negligence claim. While those documents do indicate there may be evidence pertinent to administrative negligence, they do not take the place of a pleading. The discovery requests and the supplemental designation of experts were filed prior to the 2016 Complaint. Thus, if plaintiff was aware of evidence of administrative negligence and wanted to proceed on that theory, it could have included specific allegations in the 2016 Complaint. On appeal, our Courts have refused to allow plaintiffs to assert negligence claims not pleaded in the complaint, holding that "pleadings have a binding effect as to the underlying theory of plaintiff's negligence claim." *Anderson v. Assimos*, 356 N.C. 415, 417, 572 S.E.2d 101, 102 (2002); *see also Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 630, 652 S.E.2d 302, 306-307 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008). The same holds true at the trial court level under Rule 8.

While labels of legal theories do not control, *see Haynie*, 207 N.C. App. at 149, 698 S.E.2d at 198, the 2016 Complaint, labeled "Complaint for Medical Negligence," included only allegations of medical negligence. Those negligence allegations were not sufficient to put defendant on notice of a claim of administrative negligence. Thus, we hold the trial court erred in allowing plaintiff to proceed on an administrative negligence theory in the medical malpractice action.

B. Statute of Limitations

[2] Defendant also argues that the trial court erred in denying its motion for JNOV on the administrative negligence claim because it was barred by the statute of limitations. Assuming arguendo plaintiff sufficiently pleaded an administrative negligence claim in the 2016 Complaint, we agree the claim was time barred.

Generally, there is a three-year statute of limitations period for any medical malpractice action. N.C. Gen. Stat. § 1-15(c) (2017). Defendant, however, argues the applicable statute of limitations in this case is the two-year limitations period for bringing a wrongful death claim based on negligence. *See* N.C. Gen. Stat. § 1-53(4) (2017). This Court has held that a wrongful death action based on medical malpractice must be brought within two years of a decedent's death. *See King v. Cape Fear Mem'l Hosp., Inc.*, 96 N.C. App. 338, 341, 385 S.E.2d 812, 814 (1989) (holding discovery exception for latent injuries contained in N.C. Gen. Stat. § 1-15(c) did not apply to a wrongful death action based upon medical malpractice), *disc. review denied*, 326 N.C. 265, 389 S.E.2d 114 (1990). Regardless of whether defendant pleaded a wrongful death claim in addition to a medical malpractice claim in this case, *see Udzinski v. Lovin*, 159 N.C. App. 272, 275, 583 S.E.2d 648, 650-51 (2003) (explaining that although not perfectly worded, the plaintiff had sufficiently alleged a wrongful death claim in addition to and based on the underlying medical malpractice claim), both limitations periods expired prior to plaintiff's filing of the 2016 Complaint on 1 February 2016, almost four years after decedent's death on 30 April 2012. That, however, does not end our inquiry.

Rule 41(a) of the North Carolina Rules of Civil Procedure provides that "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice . . . a new action based on the same claim may be commenced within one year after such dismissal . . . ." N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2017). This Court has explained that "the relation-back provision in Rule 41(a)(1) only applies to those claims in the second complaint that were included in the voluntarily-dismissed first complaint." *Williams v. Lynch*, 225 N.C. App. 522, 526, 741 S.E.2d 373, 376 (2013).

Plaintiff filed the 2014 Complaint on 23 April 2014, less than two years after decedent's death and within any applicable statute of limitations. Plaintiff then took a voluntary dismissal of the 2014 Complaint on 19 January 2016, just weeks before filing the 2016 Complaint. The timing of plaintiff's filing of the 2014 Complaint and plaintiff's subsequent

voluntary dismissal and filing of the 2016 Complaint allows for the possibility that an administrative negligence claim in the 2016 Complaint is timely if it relates back to the 2014 Complaint.

However, assuming arguendo the 2016 Complaint pleads an administrative negligence claim, that claim does not relate back to the 2014 Complaint. As detailed above, this Court made clear in *Estate of Ray* that medical negligence and administrative negligence are distinct claims. 227 N.C. App. at 29, 744 S.E.2d at 471 ("[t]here are fundamentally two kinds of [corporate negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to negligence in the administration or management of the hospital."). All of the factual and negligence allegations pleaded in the 2014 Complaint relate to the medical care provided by defendant to decedent. There are no allegations of breaches of defendant's administrative duties.

Apart from the 2014 Complaint, plaintiff's own statements show that it could not have pleaded administrative negligence in the 2014 Complaint. As noted above, plaintiff's motion for leave to amend the complaint and the attached proposed amended complaint filed on 6 January 2016 include the necessary allegations to plead a claim of administrative negligence. In the motion, plaintiff admits that it

> had no way of knowing about the manner in which [CMC-Northeast's] emergency department operated, [CMC-Northeast's] failure to provide and/or require adequate training, instruction, monitoring, compliance, coordination among providers, and supervision of its employees and contracted medical staff members concerning utilization, implementation, and compliance with its written protocols, standing orders, guidelines, procedures, and/or policies, and the issues concerning [the nurse who received defendant at the hospital].

Plaintiff further states in the motion that it sought to continue the case in November 2015 "to explore '. . . new areas of negligence not previously known to [p]laintiff . . .' and to perhaps seek 'amendment to [p]laintiff's [c]omplaint.' "

These statements by plaintiff in the motion for leave to amend the 2014 Complaint are noteworthy because they indicate plaintiff did not have enough information to plead an administrative negligence claim at the time plaintiff filed the 2014 Complaint. Since plaintiff did not plead an administrative negligence claim in the 2014 Complaint, any

administrative negligence claim in the 2016 Complaint did not relate back to the 2014 Complaint and, therefore, is time barred.

Plaintiff argues this case is similar to *Haynie*, in which this Court rejected the defendant's argument that a negligent entrustment claim, which was pleaded in a second complaint filed after a voluntary dismissal of the original complaint, should be dismissed because it was not based on the claims in the original complaint. 207 N.C. App. at 149, 698 S.E.2d at 199. Plaintiff contends that defendant has asked this Court to do what it refused to do in *Haynie*–to ignore the original complaint and to instead focus on proposed amendments to the complaint. *Id.* at 150, 698 S.E.2d at 199. The present case is distinguishable. In *Haynie*, this Court held "[the] plaintiff did allege the necessary elements to put [the] defendant . . . on notice of the claim of negligent entrustment, even if plaintiff mislabeled or failed to label the claim." *Id.* at 149-50, 698 S.E.2d at 199. A review of plaintiff's motion to amend and the attached proposed amended complaint in this case only highlights what is evident from a review of the 2014 Complaint—there are no allegations of breaches of defendant's administrative duties in the 2014 Complaint to put defendant on notice of an administrative negligence claim.

C. Sufficiency of the Evidence

[3] Defendant next argues that even if an administrative negligence claim was properly pleaded and timely, the trial court erred in denying its motion for a JNOV on both the administrative negligence claim and the medical negligence claim because plaintiff failed to present sufficient evidence to submit the claims to the jury. Having determined the administrative negligence claim was not properly pleaded, we only address defendant's argument as it relates to medical negligence.

As stated above, "[a] civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical . . . care by a health care provider" is defined as a medical malpractice action in N.C. Gen. Stat. § 90-21.11(2)(a). "In [such] a medical malpractice action, a plaintiff has the burden of showing '(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.' " *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (quoting *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998)). Here, defendant only challenges the sufficiency of the evidence to establish the standard of care for medical negligence.

N.C. Gen. Stat. § 90-21.12 sets forth the appropriate standards of care in medical malpractice actions. Pertinent to claims of medical negligence, the statute provides:

> in any medical malpractice action as defined in [N.C. Gen. Stat. §] 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence *that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time of the alleged act giving rise to the cause of action*[.]

N.C. Gen. Stat. § 90-21.12(a) (emphasis added). "Because questions regarding the standard of care for health care professionals ordinarily require highly specialized knowledge, the plaintiff must establish the relevant standard of care through expert testimony." *Smith v. Whitmer*, 159 N.C. App. 192, 195, 582 S.E.2d 669, 671-72 (2003).

In this case, plaintiff presented Dr. Dan Michael Mayer as an expert to testify regarding the standard of care for medical negligence. Defendant contends that "Dr. Mayer's demonstrated lack of familiarity with the community standard of care rendered him unqualified to testify regarding the standard of care for the medical negligence claim." We disagree with defendant's characterization of Dr. Mayer's familiarity with the community standard of care.

This Court has applied a highly deferential standard of review to evidentiary rulings on expert testimony, explaining that

> [t]rial courts are afforded a wide latitude of discretion when making a determination about the admissibility of expert testimony. The trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. A trial court's evidentiary ruling is not an abuse of discretion unless it was so arbitrary that it could not have been the result of a reasoned decision.

Kearney v. Bolling, 242 N.C. App. 67, 76, 774 S.E.2d 841, 848 (2015) (internal quotation marks and citations omitted), *disc. review denied*, __ N.C. __, 783 S.E.2d 497 (2016).

This Court has explained that

> [a]n expert witness "testifying as to the standard of care" is not required "to have actually practiced in the same community as the defendant," but "the witness must demonstrate that he is familiar with the standard of care in the community where the injury occurred, or the standard of care in similar communities."

Id. (quoting *Smith*, 159 N.C. App. at 196, 582 S.E.2d at 672). " '[O]ur law does not prescribe any particular method by which a medical doctor must become familiar with a given community. Book or Internet research may be a perfectly acceptable method of educating oneself regarding the standard of medical care applicable in a particular community.' " *Robinson v. Duke Univ. Health Sys., Inc.*, 229 N.C. App. 215, 236, 747 S.E.2d 321, 336 (2013) (quoting *Grantham v. Crawford*, 204 N.C. App. 115, 119, 693 S.E.2d 245, 248-49 (2010)), *disc. review denied*, 367 N.C. 328, 755 S.E.2d 618 (2014).

> The "critical inquiry" in determining whether a medical expert's testimony is admissible under the requirements of N.C. Gen. Stat. § 90-21.12 is "whether the doctor's testimony, taken as a whole" establishes that he "is familiar with a community that is similar to a defendant's community in regard to physician skill and training, facilities, equipment, funding, and also the physical and financial environment of a particular medical community."

Kearney, 242 N.C. App. at 76, 774 S.E.2d at 848 (quoting *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 197, 605 S.E.2d 154, 156 (2004), *aff'd per curiam*, 359 N.C. 626, 614 S.E.2d 267 (2005)). "According to our Supreme Court, '[a]ssuming expert testimony is properly qualified and placed before the trier of fact, [N.C. Gen. Stat. §] 90-21.12 reserves a role for the jury in determining whether an expert is sufficiently familiar with the prevailing standard of medical care in the community.' " *Grantham*, 204 N.C. App. at 119, 693 S.E.2d at 248 (quoting *Crocker v. Roethling*, 363 N.C. 140, 150, 675 S.E.2d 625, 633 (2009) (Martin, J., concurring) (citing N.C. Gen. Stat. § 90-21.12 (2007))).

As stated above, plaintiff presented Dr. Mayer to testify as an expert about the community standard of care for purposes of medical negligence. Dr. Mayer was accepted by the trial court as an expert in emergency medicine in a hospital setting, emergency nursing services, and chest pain protocols. While giving his background in emergency medicine, Dr. Mayer testified that he most recently practiced emergency

medicine at Albany Medical Center and taught at Albany Medical College, an accredited medical school, until he retired in 2014. Dr. Mayer further explained that he continues to be involved in the field of emergency medicine by regularly teaching in the emergency medicine residency program at Albany Medical College and by teaching medical students at Albany Medical College.

Regarding the standard of care, Dr. Mayer testified that he was familiar with the standard of care at CMC-Northeast. Dr. Mayer explained that he "found . . . [CMC-Northeast] was in many ways very similar to Albany Medical Center" because they have "pretty much the same types of specialists for general specialty medical problems[.]" Dr. Mayer opined that the community standard of care in Albany was the same or very similar to the community standard of care expected in Concord and explained "[t]here would only be a small minority of patients, none of whom would fit the characteristics of [decedent], that would be treated differently at [CMC-Northeast] than would be treated at Albany Medical Center." Dr. Mayer added that he was familiar with the standard of care that applies to nurses in the emergency department at CMC-Northeast because "[t]he types of duties that nurses have at CMC[-]Northeast is exactly the same as the role of nurses at Albany Medical Center."

To establish a basis for Dr. Mayer's familiarity with the standard of care and to support his conclusions in this case, plaintiff questioned Dr. Mayer about the materials he reviewed in preparation for the case. Dr. Mayer testified that he first reviewed the record in this case which included decedent's medical records from 30 April 2012 and the depositions of the attending emergency department physician, the emergency department nurse who attended to decedent, the paramedic who responded to the emergency calls, and other hospital employees and administrators. Dr. Mayer also reviewed CMC-Northeast's policies and procedures, including the hospital's application to become certified as a Chest Pain Center. Dr. Mayer explained that he reviews these types of materials before he discusses the case with the attorneys so that he "can give as objective a review of the care that was provided as possible." Dr. Mayer then advises whether there is a case or not based on the standard of care, which Dr. Mayer further explained is "not perfect care," but "what a reasonably prudent physician under the same circumstances would do."

Pertaining to the community standard of care in this case, Dr. Mayer testified that he reviewed a lengthy demographics package, which he explained contained information about "the characteristics of Cabarrus County and of Concord and of the -- both the general demographics and

also the medical issues, you know, what types of physicians practice here, what are the different hospitals, how big are the hospitals, how many patients do they see." Dr. Mayer stated that it was important for him to review this information because "I want to make sure that in fact what I'm testifying to about the standard of practice in Cabarrus County, and specifically at [CMC-Northeast], is something that I'm familiar with and that I can then testify truthfully would be appropriate care and reasonable care." Dr. Mayer acknowledged that there are community standards of care and explained that the purpose of reading the demographics package was to determine whether there were extenuating circumstances that were relevant to the standard of care in Concord. Dr. Mayer also indicated that he reviewed websites for Carolinas Healthcare System.

Based on the information reviewed by Dr. Mayer about Concord and CMC-Northeast, Dr. Mayer testified the community standard of care in this case was similar to Albany Medical Center, where he worked and with which he was familiar.

Citing this Court's decision in *Smith*, 159 N.C. App. 192, 582 S.E.2d 669 (2003), defendant contends Dr. Mayer's testimony was insufficient to establish that he was familiar with the relevant community standard of care because Dr. Mayer had never been to the area prior to offering testimony in this case; Dr. Mayer had never practiced medicine in North Carolina, held a medical license in North Carolina, or previously testified in North Carolina; Dr. Mayer's familiarity was based on the demographics package received for purposes of testifying; and because Dr. Mayer noted differences between CMC-Northeast and Albany Medical Center and unjustifiably compared the two. Defendant asserts the above argument in reference to the community standard of care for administrative negligence, but subsequently asserts that "[t]he same holds true with respect to [plaintiff's] medical negligence claim: Dr. Mayer's demonstrated lack of familiarity with the community standard of care rendered him unqualified to testify regarding the standard of care for the medical negligence claim." We are not convinced.

In *Smith*, this Court held the trial court properly excluded testimony of the plaintiff's expert witness because the witness' testimony was devoid of support for his assertion that he was sufficiently familiar with the applicable standard of care. 159 N.C. App. at 196-97, 582 S.E.2d at 672-73. This Court explained that the witness

> stated that the sole information he received or reviewed concerning the relevant standard of care . . . was verbal

> information from [the] plaintiff's attorney regarding "the approximate size of the community and what goes on there." [The witness] could offer no further details . . . concerning the medical community, nor could he actually remember what plaintiff's counsel had purportedly told him.

Id. at 196-97, 582 S.E.2d at 672. Furthermore, the witness stated there was a national standard of care and "that he could 'comment on the standard of care as far as a reasonably prudent orthopedic surgeon anywhere in the country regardless of what [this particular] medical community . . . might do.' " *Id.* at 197, 582 S.E.2d at 672.[2]

Unlike in *Smith*, Dr. Mayer's testimony in this case was based on his review of a lengthy demographics package, internet research conducted by Dr. Mayer on CMC-Northeast, and Dr. Mayer's comparison of the community to Albany Medical Center. Plaintiff has cited many cases in which this Court has determined similar bases were sufficient to demonstrate familiarity with the community standard of care. *See i.e. Kearney*, 242 N.C. App. at 76-78, 774 S.E.2d at 848-49; *Robinson*, 229 N.C. App. at 235-36, 747 S.E.2d at 335-36; *Day v. Brant*, 218 N.C. App. 1, 6-7, 721 S.E.2d 238, 243-44, *disc. review denied*, 366 N.C. 219, 726 S.E.2d 179 (2012).

We agree the present case is governed by those cases cited by plaintiff and hold the trial court did not abuse its discretion in determining Dr. Mayer was qualified to testify as an expert to the community standard of care for medical negligence.

2. New Trial

[4] In the event the trial court erred in denying its motion for a JNOV on administrative negligence, but the trial court did not err in denying its motion for a JNOV on medical negligence, defendant asserts a new trial is required on medical negligence. Defendant argues that the evidence and the jury instructions for administrative negligence and medical negligence were so "intermingled" that "the jury's determination on the medical negligence claim . . . was tainted by the trial court's error in

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2. Defendant also cites this Court's unpublished decision in *Barbee v. WHAP, P.A.*, __ N.C. App. __, 803 S.E.2d 701, COA16-1154 (2017) (unpub.), available at 2017 WL 3481038, *7-11 (holding that the plaintiff's expert witness failed to demonstrate familiarity with the relevant community standard of care after the witness testified during a deposition that he had never been to the area, knew nothing about the hospital, knew nothing about the training and experience of the doctors at the hospital, and did not know any doctors in the State).

allowing the administrative negligence claim to proceed at trial at all." We are not convinced a new trial is required.

Defendant first takes issue with the inclusion of "implement" in the jury instructions for medical negligence by arguing its inclusion "suggested to the jury that it could find [defendant] liable for medical negligence based on administrative negligence-related principles." This is defendant's only challenge to the jury instructions.

"[T]he trial court has wide discretion in presenting the issues to the jury . . . ." *Murrow v. Daniels*, 321 N.C. 494, 499, 364 S.E.2d 392, 396 (1988). On appeal,

> this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Hammel v. USF Dugan, Inc., 178 N.C. App. 344, 347, 631 S.E.2d 174, 177 (2006) (citations and quotation marks omitted).

A review of the jury instructions shows that the trial court used "implement" three times in the instructions for medical negligence, each time in a similar fashion. The relevant portions of the trial court's instructions are as follows:

> With respect to the first issue in this case, the plaintiff contends and the defendant denies that the defendant was negligent in one or more of the following ways. The first contention is that the hospital did not use its best judgment in the treatment and care of its patient in that the defendant did not adequately *implement and/or follow* protocols, processes, procedures and/or policies for the evaluation and management of chest pain patients in the emergency room on April 30th of 2012, in accordance with the standard of care. The second contention is that the hospital did not use its best judgment in the treatment and care of its patient, in that its employee,

> [the attending nurse], did not adequately collect and/or communicate to other health care providers pertinent medical information necessary for the care and treatment of [decedent] on April 30th of 2012.
>
> The third contention is that the hospital did not use reasonable care and diligence in the application of its knowledge and skill to its patient's care in that Carolinas Healthcare System did not adequately *implement and/or follow* the protocols, processes, procedures and/or policies for the evaluation and management of chest pain patients in the emergency room or emergency department on April 30th of 2012. The fourth contention is that the hospital did not use reasonable care and diligence and the application of its knowledge and skill to its patient's care in that its employee, [the attending nurse], did not adequately collect and/or communicate to other health care providers pertinent medical information necessary for the treatment and care of [decedent] on April 30th of 2012.
>
> The fifth contention is that the hospital did not provide health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered, and that the defendant did not adequately *implement and/or follow* the protocols, processes, procedures and/or policies in place in the emergency department on April 30th of 2012.
>
> The sixth contention is that the hospital did not provide health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered, and that its employee, [the attending nurse], did not adequately collect and/or communicate to other medical providers pertinent medical information necessary for the treatment and care of [decedent] on April 30th of 2012. (Emphasis added).

The trial court then went on to instruct as follows:

> With respect to the plaintiff's first contention, a hospital has a duty to use its best judgment in the treatment and

care of its patient. A violation of this duty is negligence. With respect to the plaintiff's second contention, a nurse has a duty to use her best judgment in the treatment and care of her patient. A violation of this duty is negligence. With respect to the plaintiff's third contention, a hospital has a duty to use reasonable care and diligence in the application of its knowledge and skill to its patient's care. A violation of this duty is negligence.

With respect to the plaintiff's fourth contention, a nurse has a duty to use reasonable care and diligence and the application of her knowledge and skill to her patient's care. A violation of this duty is negligence. With respect to the plaintiff's fifth contention, a hospital has a duty to provide health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered. In order for you to find that the hospital did not meet this duty, the plaintiff must satisfy you by the greater weight of the evidence, first, what the standards of practice were among hospitals with similar resources and personnel in the same or similar communities at the time the defendant cared for [decedent], and, second, that the defendant did not act in accordance with those standards of practice. . . . A violation of this duty is negligence.

With respect to the defendant's sixth contention, a nurse has a duty to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care is rendered. In order for you to find that the defendant's employee, [the attending nurse], did not meet this duty, the plaintiff must satisfy you by the greater weight of the evidence, first, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities at the time [the attending nurse] cared for [decedent]. And, second, that [the attending nurse] did not act in accordance with those standards of practice. . . . A violation of this duty is negligence.

In response to defendant's argument that the inclusion of "implement" intermingled the administrative negligence and medical negligence claims, plaintiff cites Merriam-Webster in support of its' contention that "implement" and "follow" are nearly synonymous in meaning. Therefore, plaintiff asserts the trial court did not err in using both terms in the jury instructions. Plaintiff also claims that *Blanton v. Moses H. Cone Mem'l Hosp., Inc.*, 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987), directly supports inclusion of "implement" in the instructions. We are not convinced the inclusion of "implement" in the instructions for medical negligence was not error. First, "implement" is never mentioned in *Blanton*. Second, while "implement" and "follow" may be used similarly in some circumstances, they may also be used differently. It is evident from the use of both "implement" and "follow" in the instructions above in the alternative that the terms are not synonymous in this instance.

Nevertheless, when these instructions are considered in their entirety, it is clear that the medical negligence instructions directed the jury to consider the treatment and care provided by defendant to decedent. Although defendant is correct that implementation of protocols, processes, procedures and/or policies is usually an administrative duty, the use of "implement" three times in the above instructions in the alternative to "follow" was not likely to mislead the jury when the instructions are considered in their entirety. Defendant has failed to show that the trial court's error in allowing the administrative negligence claim to proceed impacted the jury instructions to its detriment where ample evidence was presented that defendant failed to follow its policies and that the attending emergency department nurse did not collect or communicate pertinent medical information for decedent's care.

[5] In regards to the evidence at trial, defendant contends the admission of documents related to defendant's application for accreditation as a Chest Pain Center and other evidence of policies and protocols was only relevant to the administrative negligence claim, if at all, and would not have been admitted if plaintiff's action was only for medical negligence. Defendant asserts that this improper evidence "inflamed and prejudiced the jury against the hospital, ultimately impacting the jury's determination on both negligence claims."

While evidence of policies and protocols may not necessarily establish the standard of care, *see O'Mara v. Wake Forest Univ. Health Sciences*, 184 N.C. App. 428, 439, 646 S.E.2d 400, 406 (2007) (explaining that "violation of a hospital's policy is not necessarily a violation of the applicable standard of care, because the hospital's rules and policies

may reflect a standard that is above or below what is generally considered by experts to be the relevant standard"), evidence of the defendant's policies and protocols, or its purported policies and protocols, is certainly relevant and properly considered alongside expert testimony to establish the standard of care for medical negligence. As defendant points out, expert testimony in this case clarified which policies and protocols were in place at CMC-Northeast.

Although not all evidence of policies and protocols related to the defendant's application for accreditation as a Chest Pain Center may have been admitted into evidence absent the trial court allowing the administrative negligence claim to proceed, defendant has not shown that the evidence impacted the jury's verdict on medical negligence. This Court has long recognized that "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). Defendant's assertion that "the inflammatory nature of the evidence relating to the Chest Pain Center application was palpable and highly prejudicial" is not sufficient proof.

Defendant summarily claims that "absent this evidence . . . no rational jury would have returned a $6.13 million verdict against the hospital based solely on [the nurses] alleged negligence in communicating the decedent's information to [the attending physician]." We are not convinced.

3. Pain and Suffering

[6] In the event we did not reverse outright or grant a new trial, defendant alternatively asserts the trial court erred in allowing the jury to award damages for pain and suffering because there was insufficient evidence of pain and suffering.

The issue of pain and suffering was argued numerous times during trial before the trial court allowed the issue to go to the jury. Defendant first moved for a directed verdict on damages for "conscious pain and suffering" after it reviewed plaintiff's proposed jury instruction. Defendant argued "there was no evidence put on as to any conscious pain and suffering of [decedent]." The trial court asked if either party would like to be heard and both responded in the negative. The trial court then stated that it "would grant [a] directed verdict on that issue because there has been no evidence as to pain and suffering of [decedent] . . . ."

Immediately thereafter, plaintiff indicated that it would like to be heard on the issue of pain and suffering, and the trial court obliged.

Plaintiff admitted that no one was around decedent to observe pain and suffering, but argued that does not mean it didn't happen. Plaintiff pointed out that one doctor testified decedent could have experienced pain for an hour prior to his death, a second doctor testified decedent could have experienced pain for 20 minutes prior to his death, and a third doctor testified he didn't know one way or the other. Plaintiff then concluded its argument stating:

> So there is evidence of conscious pain and suffering. Well, there's evidence that it could have existed, but I don't think that the jury should be precluded from considering that because there was evidence that -- nobody really knows because nobody observed it, but there certainly is evidence that it could have occurred from defendant's witnesses and also for plaintiff's witnesses.

In response, defendant argued "possibly or could have . . . does not meet the burden of proof in terms of more likely than not [decedent] had conscious pain and suffering[,]" adding that evidence of "more likely than not" is "what they would need to submit to support any jury award for that element. A mere possibility or that it could have happened would not meet the burden of proof." Upon consideration of the arguments, the trial court "once again [found] that there has not been sufficient evidence of conscious pain and suffering to meet the legal standard" and granted defendant's motion for a directed verdict on damages for pain and suffering.

Plaintiff then changed its argument and sought for a third time to address the issue of pain and suffering, arguing that decedent experienced pain and suffering from the time he was first admitted to the emergency department and as a result of anxiety from being discharged without answers. For a third time, the trial court granted defendant's motion for a directed verdict on damages for pain and suffering.

Following the weekend recess, plaintiff again raised the issue by objecting to the trial court's prior rulings when the proceedings reconvened. At that point, plaintiff had revisited the testimony of Dr. Andrew Selwyn and was able to direct the court to the doctor's testimony that it was more likely than not that decedent would have experienced chest pain. Defendant simply responded that there was no evidence of actual chest pain. Based on the plaintiff's argument, the trial court changed its ruling, explaining that "there is some evidence so . . . it is a factual issue. . . . [W]e'll need to put the pain and suffering back in the instructions . . . for the jury to make that determination."

Now on appeal, defendant contends the only relevant evidence, Dr. Selwyn's testimony, amounts to speculation. Defendant therefore claims the evidence failed to meet plaintiff's burden to support an award of damages for pain and suffering.

"The law disfavors-and in fact prohibits-recovery for damages based on sheer speculation." *DiDonato v. Wortman*, 320 N.C. 423, 430, 358 S.E.2d 489, 493 (1987) (internal citations omitted). Both plaintiff and defendant acknowledge that "[d]amages must be proved to a reasonable level of certainty, and may not be based on pure conjecture." *Id.* at 431, 358 S.E.2d at 493. In *DiDonato*, the Court relied on its much earlier decision in *Norwood v. Carter*, 242 N.C. 152, 87 S.E.2d 2 (1955), in which the Court held, "[n]o substantial recovery may be based on mere guesswork or inference . . . without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered." *Id.* at 156, 87 S.E.2d at 5. Based on this reasoning, the Court held in *DiDonato* that "damages for the pain and suffering of a decedent fetus are recoverable if they can be reasonably established." 320 N.C. at 432, 358 S.E.2d at 494.

In this case, the only testimony identified by plaintiff as supporting the award damages for pain and suffering was as follows:

> Q. Is there any relevance to the fact that [decedent] had presented with chest pain earlier that day as to whether that same chest pain would have arisen before he really got in trouble with this event?
>
> A. Yes, it's relevant.
>
> Q. And tell us why that's relevant.
>
> A. Well, he presented with a fairly typical picture of chest pain radiating to the stomach, up into the neck, to the hands, which went away with nitroglycerin. So that's the way this man presents. So somewhere around 8, 9 or 9, 10, 11 o'clock that night, more likely than not he would have got chest pain again and manifested ischemia, which would have been treated. Unfortunately, he was at home, it wasn't treated, and it just progressed and he died.
>
> Q. So because he had previously presented with chest pains from ischemia, more likely than not that would have occurred again giving warning to the staff, if he was at the hospital, if that situation arose?

A. Yes.

Defendant contends this testimony was insufficient because it is speculative. Defendant also points to conflicting testimony. Plaintiff contends this testimony was sufficient proof to a reasonably degree of certainty because Dr. Selwyn testified that it was "more likely than not."

Although we agree with plaintiff that testimony that something "is more likely than not" is generally sufficient proof that something occurred, Dr. Selwyn's testimony, standing alone, is insufficient to support proof of damages for pain and suffering to a reasonable degree of certainty where there was no further evidence for the jury to consider. And while it is not this Court's job to reweigh the evidence, we do note that ample other evidence was presented to show that plaintiff may not have experienced any further chest pain. Dr. Selwyn even testified that there was "no direct evidence" of chest pain following decedent's discharge from the emergency department. Where the only evidence is that it was likely decedent experienced chest pain because he had previously experienced chest pain, we hold the evidence was insufficient to establish damages for pain and suffering to a reasonable degree of certainty.

The trial court instructed the jury that "[n]oneconomic damages are damages to compensate for pain, suffering, emotional distress, loss of consortium, inconvenience and any other non-pecuniary compensatory damage." The trial court then instructed the jury that it may consider the following categories of non-economic damages in this case: "[p]ain and suffering and the present monetary value of [decedent] to his next of kin from his society, companionship, comfort, guidance, kindly offices, advice, protection, care or assistance from the services that he provided for which you do not find a market value." Defendant has only challenged the sufficiency of the evidence for pain and suffering.

Because the jury verdict in this case only separated the damages into economic damages and non-economic damages and did not further break down the non-economic damages by categories, it is impossible to determine what portion of the jury's award of non-economic damages was for pain and suffering. As a result, this Court cannot just vacate the award of damages for pain and suffering, but instead must remand for a new trial on the issue of non-economic damages.

4. Contributory Negligence

[7] Lastly, defendant argues in the alternative that if it is not entitled to an outright reversal or a new trial, the trial court erred in granting

plaintiff's motion for a directed verdict on defendant's contributory negligence defense. Plaintiff moved for a directed verdict on contributory negligence at the close of all the evidence and the trial granted plaintiff's motion, finding that no evidence of contributory negligence by the decedent had been presented.

"[C]ontributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Watson v. Storie*, 60 N.C. App. 736, 738, 300 S.E.2d 55, 57 (1983) (internal quotation marks and citations omitted). Our Supreme Court has explained that

> [i]n this state, a plaintiff's right to recover . . . is barred upon a finding of contributory negligence. The trial court must consider any evidence tending to establish plaintiff's contributory negligence in the light most favorable to the defendant, and if diverse inferences can be drawn from it, the issue must be submitted to the jury. If there is more than a scintilla of evidence that plaintiff is contributorily negligent, the issue is a matter for the jury, not for the trial court.

Cobo v. Raba, 347 N.C. 541, 545, 495 S.E.2d 362, 365 (1998) (internal citations omitted).

In this case, defendant contends there was substantial evidence from which the jury could reasonably find that decedent was contributorily negligent. Defendant then identifies decedent's failure to report to the attending nurse and the attending physician that he was given aspirin and nitroglycerin for his chest pain by EMS prior to this arrival at the emergency department. Defendant compares this case to cases in which patients failed to report their symptoms, or the worsening of symptoms, to their healthcare providers. *See Cobo*, 347 N.C. at 546, 495 S.E.2d at 366; *McGill v. French*, 333 N.C. 209, 220-21, 424 S.E.2d 108, 114-15 (1993); *Katy v. Capriola*, 226 N.C. App. 470, 478, 742 S.E.2d 247, 253-54 (2013). Under these precedents, defendant contends decedent had an affirmative duty to report that EMS gave him medication in the ambulance.

We are not convinced that this case is similar to those cases cited by defendant. There is no indication that decedent in this case failed to report his symptoms to medical personnel. In fact, the evidence shows that decedent was involved in his treatment and sought answers for his continuing discomfort. Moreover, we are not convinced that the failure

to report symptoms is analogous to decedent not reporting that EMS gave him medication to relieve his chest pain in route to the hospital. We agree with the trial court that there was no evidence of contributory negligence on the part of decedent in this case. Thus, the trial court did not err in granting plaintiff's motion for a directed verdict on the issue.

III. Conclusion

For the reasons stated, we hold the trial court erred in allowing plaintiff to proceed at trial on a theory of administrative negligence. That error, however, did not prejudice the jury verdict on plaintiff's medical negligence claim. The trial court also erred in allowing the jury to award damages for pain and suffering and, therefore, a new trial is required on non-economic damages only. The trial court did not err in granting plaintiff's motion for a directed verdict on the issue of contributory negligence.

REVERSE IN PART, VACATE IN PART, NEW TRIAL IN PART.

Judge INMAN concurs.

Judge MURPHY concurs in result only.

IN THE MATTER OF D.A.

No. COA18-287

Filed 4 December 2018

Child Abuse, Dependency, and Neglect—permanency planning hearing—permanent plan—statutory mandate

The trial court erred by granting custody of a neglected child to his maternal grandparents without first adopting a permanent plan as required by statute (N.C.G.S. § 7B-906.2).

Appeal by respondent-father from order entered 21 November 2017 by Judge Keith Gregory in Wake County District Court. Heard in the Court of Appeals 8 November 2018.

Wake County Attorney's Office, by Mary Boyce Wells, for petitioner-appellee Wake County Human Services.

IN RE D.A.

[262 N.C. App. 559 (2018)]

David A. Perez, for respondent-appellant father.

Poyner Spruill LLP, by Hannah M.L. Munn, for Guardian ad Litem.

CALABRIA, Judge.

Respondent, the father of D.A. ("Dustin")[1], appeals from the trial court's permanency planning order granting custody of Dustin to the child's maternal grandparents. Because we hold the trial court failed to adopt a permanent plan for Dustin as mandated by N.C. Gen. Stat. § 7B-906.2, we reverse the trial court's order and remand for further proceedings.

I. Factual and Procedural Background

Respondent and the child's mother are no longer involved in a relationship. The mother lives in Hawaii, while respondent lives in Oregon with his girlfriend. The mother has three other children besides Dustin and is involved with the Honolulu Department of Human Services regarding two of those children. Dustin was living with his mother until March 2016 when he left to live with respondent in Chicago, Illinois.

On 26 October 2016, Wake County Human Services ("WCHS") filed a juvenile petition alleging Dustin to be a neglected and dependent juvenile. WCHS alleged that it received a report on 18 October 2016 that Dustin was sent by respondent from Chicago in July of 2016 to stay with his maternal grandparents, Mr. and Mrs. J., in Wendell, North Carolina for a few weeks while he established himself in a new job. A few weeks later, respondent asked if Dustin could stay a couple more weeks as he was still seeking employment. Mr. and Mrs. J. attempted to enroll Dustin in school but needed signed documents from respondent and the mother in order to do so. The petition alleged that respondent had refused to comply with getting the appropriate forms notarized and failed to contact the social worker in order for Dustin to be enrolled in school. WCHS obtained nonsecure custody of Dustin and continued his placement with Mr. and Mrs. J.

The trial court held a hearing on the petition on 22 February and 21 March 2017. On 1 May 2017, the trial court entered an order adjudicating Dustin as neglected. The court ordered respondent to comply with his Out of Home Family Services Agreement, which required

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

him to enter into and comply with a visitation agreement; complete a drug treatment program and follow all recommendations; refrain from using illegal or impairing substances and submit to random drug screens; complete a psychological assessment and follow all recommendations; complete parenting classes and demonstrate learned skills; and obtain and maintain sufficient housing and income. The trial court found that respondent was a fit and proper person to have unsupervised overnight visitation a minimum of one weekend per month. The trial court did not establish a permanent plan but ordered WCHS to continue to make reasonable efforts to eliminate Dustin's need for placement outside of the home.

The trial court held a placement review and permanency planning hearing on 15 June 2017. In an order entered 9 August 2017, the trial court found that respondent had made substantial progress on his Family Services Agreement goals in that he completed a parenting course, secured sufficient housing, and was participating in therapy. The trial court also found that respondent's home was safe and appropriate for Dustin and that respondent could provide proper care and supervision of Dustin on a trial home placement basis. Therefore, the trial court continued Dustin's custody with WCHS but ordered a trial placement with respondent in Oregon. The court ordered respondent to comply with the conditions of the trial home placement, which included the following: demonstrate learned skills from parenting class; provide at least five days advance notice prior to taking Dustin on an out of state trip; maintain Dustin's enrollment in public school without interruption from trips; maintain sufficient housing; seek out safe and appropriate extracurricular activities for Dustin; maintain sufficient lawful income; complete a psychological or mental health assessment and follow all recommendations; and maintain regular contact with WCHS and the social worker, notifying WCHS of any change in circumstances within five business days.

On 15 June 2017, Dustin began his trial home placement with respondent. Upon leaving North Carolina, respondent traveled with Dustin to Georgia to visit with respondent's sister through the end of the month. A Georgia social worker checked on the family during this time and verified Dustin's well-being and safety. On 7 July 2017, respondent reported to WCHS that he and Dustin had traveled to Illinois and were visiting with respondent's mother for a few weeks. A wellness check was done while respondent was in Illinois. On 2 August 2017, respondent informed WCHS that they had arrived home in Portland, Oregon.

Respondent contacted the Oregon Interstate Compact on the Placement of Children ("ICPC") social worker, Sonya Sullivan, in order to obtain health insurance for Dustin so that he could take Dustin to the dentist in Oregon and enroll him in therapy. Ms. Sullivan conducted a home visit on 10 August 2017 and the visit "went well." However, Ms. Sullivan learned that respondent and his girlfriend had purchased airline tickets for themselves and Dustin to go to France to attend a wedding and for respondent and his girlfriend to get married. Respondent had not informed WCHS of the trip or that he planned to marry. Respondent had purchased the tickets in April 2017 hoping to have custody of Dustin and planned to fly out of New York on 1 August 2017. However, as a result of the scheduled home visit in Oregon, neither respondent nor Dustin went to France.

On 23 August 2017, Ms. Sullivan reported to WCHS that an FBI background check revealed an outstanding warrant for respondent from Georgia. Ms. Sullivan initially believed the order for arrest was due to a federal probation violation. However, it was later discovered respondent had failed to appear for a scheduled hearing in Georgia in 2014 for a misdemeanor driving without a license charge. Social services contacted respondent on 23 August 2017 regarding the existence of the warrant. Because respondent was not able to provide a feasible plan of care for Dustin if respondent was arrested on the outstanding warrant, WCHS decided to remove Dustin from respondent's care. Dustin was removed from respondent's home on 24 August 2017 and placed back in the home of Mr. and Mrs. J. Respondent contacted the state of Georgia and his warrant was cancelled by 26 or 27 August 2017.

A subsequent placement and permanency planning hearing was held on 13 October 2017. In an order entered 21 November 2017, the court found that respondent had signed Dustin up for soccer and parkour, but did not enroll Dustin in public school or obtain dental treatment for Dustin prior to his removal from the home on 24 August 2017. The court also found that respondent did not provide proof of his income and that respondent acknowledged he drove with Dustin in the car many times without having a valid driver's license. Therefore, the court found that respondent "continued to act in a manner inconsistent with [his] constitutionally protected status as a parent" and that it was not possible for Dustin to return to respondent's home in the next six months. Accordingly, the trial court awarded legal custody of Dustin to the maternal grandparents. The court also waived further review hearings and relieved WCHS, the guardian ad litem, and respondent's attorney "of further obligations in this matter." Respondent filed timely written notice of appeal on 19 December 2017.

Respondent appeals from the trial court's permanency planning order changing legal custody of Dustin pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (2017).

II. Permanent Plan

Respondent's sole argument on appeal is that the trial court erred in ceasing reunification efforts because the trial court's findings of fact do not support such a conclusion. Because the trial court failed to comply with statutory mandate and adopt a permanent plan for Dustin, however, we decline to address this argument, and reverse and remand.

A. Standard of Review

"This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010). "Findings supported by competent evidence, as well as any uncontested findings, are binding on appeal." *In re J.A.K.*, ___ N.C. App. ___, ___, 812 S.E.2d 716, 719 (2018). The trial court's conclusions of law are reviewed *de novo*. *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation omitted).

B. Analysis

Section 7B-906.2 of our General Statutes provides that

> [a]t any permanency planning hearing pursuant to G.S. 7B-906.1, the court shall adopt one or more of the following permanent plans the court finds is in the juvenile's best interest:
>
> (1) Reunification as defined by G.S. 7B-101.
>
> (2) Adoption under Article 3 of Chapter 48 of the General Statutes.
>
> (3) Guardianship pursuant to G.S. 7B-600(b).
>
> (4) Custody to a relative or other suitable person.
>
> (5) Another Planned Permanent Living Arrangement (APPLA) pursuant to G.S. 7B-912.
>
> (6) Reinstatement of parental rights pursuant to G.S. 7B-1114.

N.C. Gen. Stat. § 7B-906.2(a) (2017). The statute further provides that "[a]t any permanency planning hearing, the court shall adopt concurrent

permanent plans and shall identify the primary plan and secondary plan." N.C. Gen. Stat. § 7B-906.2(b). "Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." *Id*. "Concurrent planning shall continue until a permanent plan has been achieved." N.C. Gen. Stat. § 7B-906.2(a1). "This Court has held that use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." *In re E.M.*, 202 N.C. App. 761, 764, 692 S.E.2d 629, 631 (quoting *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001)), *disc. review denied*, 364 N.C. 325, 700 S.E.2d 749 (2010).

Here, although the trial court indicated it held "[a] placement review and permanency planning hearing" on 13 October 2017, the trial court did not adopt a permanent plan as required by N.C. Gen. Stat. § 7B-906.2. Despite purporting to hold two permanency planning hearings in this case after the initial disposition, the trial court never established a permanent plan for the child. In the 9 August 2017 order entered after the first permanency planning hearing, the trial court ordered WCHS to continue to make reasonable efforts aimed at returning Dustin "promptly to a safe home . . . in accordance with the plan approved by this Court within this Order." However, the court did not adopt a permanent plan for Dustin in the order. Further, the 21 November 2017 order also did not establish a permanent plan for Dustin. Although this order placed custody of Dustin with Mr. and Mrs. J., the order failed to include a primary or secondary plan in accordance with N.C. Gen. Stat. § 7B-906.2(b).

Because the trial court failed to comply with the mandate set forth in N.C. Gen. Stat. § 7B-906.2, we reverse the trial court's permanency planning order awarding custody of Dustin to the maternal grandparents and waiving further review hearings. We remand the case to the trial court for entry of an order in which the court shall adopt one or more permanent plans in accordance with N.C. Gen. Stat. § 7B-906.2 and make the appropriate necessary findings. Because we are reversing the trial court's order, we need not address respondent's arguments regarding whether the trial court made sufficient findings of fact and whether particular findings were supported by the evidence.

REVERSED AND REMANDED.

Judges TYSON and ZACHARY concur.

IN RE L.S.

[262 N.C. App. 565 (2018)]

IN THE MATTER OF L.S., I.S.

No. COA18-486

Filed 4 December 2018

1. Termination of Parental Rights—grounds—failure to legitimate—sufficiency of evidence

The trial court erred by terminating a father's parental rights on the ground of failure to legitimate (N.C.G.S. § 7B-1111(a)(5)) where no evidence in the record supported a finding that the children were born out of wedlock or that the father had failed to legitimize the children.

2. Termination of Parental Rights—grounds—adequacy of notice

The trial court erred by terminating a father's parental rights on the ground of failure to make reasonable progress (N.C.G.S. § 7B-1111(a)(5)) where the termination petition failed to provide adequate notice to the father that this ground would be at issue in the termination hearing.

Appeal by respondent from order entered 14 February 2018 by Judge Herbert L. Richardson in Robeson County District Court. Heard in the Court of Appeals 8 November 2018.

Jennifer A. Clay for petitioner-appellee Robeson County Department of Social Services.

Patrick S. Lineberry for respondent-appellant.

TYSON, Judge.

Respondent-Father appeals from an order terminating his parental rights to his minor children "Liam" and "Imogen" ("the children"). *See* N.C. R. App. P. 3.1(b) (pseudonyms used to protect the identity of the children). The ground or grounds for termination found or asserted by the trial court are either unsupported by the evidence or were not alleged in the petition filed by the Robeson County Department of Social Services ("DSS"). We reverse.

I. Background

The parties stipulated and the trial court found DSS had obtained non-secure custody of the children on 31 October 2014 upon the filing of

a juvenile petition alleging they were neglected. The children were living with their mother and maternal grandmother at the time the petition was filed. Their mother suffers from dementia induced by head trauma and was subsequently admitted into a secure facility at the Greenbrier Nursing Home.

After a hearing on 2 September 2015, the trial court adjudicated the children as dependent juveniles. In its initial dispositional order, the court maintained the children in DSS' custody and granted the agency authority over their foster placements. The court relieved DSS of reunification efforts and changed the placement plan for the children from reunification with the mother to guardianship with a relative.

The court declined to enter a visitation plan for Respondent-Father, after finding the children "have stated they do not want to see their father because they are afraid of him." The court found that Respondent-Father had entered into an Out-of-Home Services Agreement ("OHSA") with DSS on 31 March 2015, to address issues of substance abuse, mental health, and domestic violence, and had requested that his children be returned home to their grandmother.

In March 2016, following a successful home study, the trial court approved a relative placement for the children in Florida with the maternal grandmother's ex-husband and his current wife ("Mr. and Mrs. R."). Mr. and Mrs. R. subsequently asked to adopt the children. After a hearing on 1 February 2017, the court changed the primary permanent plan to adoption with a concurrent plan of guardianship with a relative.

On 16 March 2017, DSS filed a petition to terminate Respondent-Father's and the mother's parental rights in the children ("TPR petition"). The trial court held an evidentiary hearing on 11 January 2018. After receiving testimony from Mr. Locklear, the children's foster care social worker, the trial court found grounds existed to terminate both parents' rights. The court received additional evidence at disposition and determined that termination of parental rights was in the best interests of the children.

In its written order, the trial court made the following ultimate findings with regard to the grounds for termination of Respondent-Father's parental rights:

> 85. The alleged father, [Respondent-Father], and any unknown father, have willfully left the children in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under

> the circumstances has been made in correcting the conditions that led to the children's removal; has failed to file an affidavit of paternity in a center [sic] registry maintained by the Department of Health and Human Services; [has not] legitimated the juvenile[s] pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose; [has not] legitimated the juveniles by marriage to the mother of the juveniles; has not provided substantial financial support or consistent care with respect to the juveniles and mother; has not established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

Based upon these adjudicatory findings, the court reached the following conclusion of law:

> 3. That grounds exist based on clear, cogent and convincing evidence, to terminate the parental rights of [Respondent-Father] . . . pursuant to North Carolina General Statute's [sic] 7B-1111 in that:
>
> a. That the alleged father, [Respondent-Father], of the children, [Imogen] and [Liam], born out of wedlock has not prior to filing the petition to terminate his parental rights: (a) married the mother of the children or (b) legitimated the children or (c) provided substantial financial support or consistent care with respect of the children and mother or (d) filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services or (e) established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

Respondent-Father filed timely notice of appeal from the court's order. Although the order also terminated the mother's parental rights, she is not a party to this appeal.

II. Jurisdiction

Jurisdiction lies in this Court from a final order of the district court pursuant to N.C. Gen. Stat. § 7B-1001(a) (2017).

III. Issue

Respondent-Father argues the trial court erred in adjudicating grounds exist to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a) (2017).

IV. Standard of Review

We review an adjudication under N.C. Gen. Stat. § 7B-1111(a) "to determine 'whether the trial court's findings of fact were based on clear, cogent, and convincing evidence, and whether those findings of fact support a conclusion that parental termination should occur[.]' " *In re J.M.K.*, __ N.C. App. __, __ S.E.2d __, 2018 WL 4200535, *2 (2018) (quoting *In re Oghenekevebe*, 123 N.C. App. 434, 435-36, 473 S.E.2d 393, 395 (1996)).

V. Failure to Legitimate

[1] Respondent-Father contends the evidence presented at the adjudicatory stage of the hearing and the trial court's evidentiary findings do not establish his failure to legitimate the children. Under N.C. Gen. Stat. § 7B-1111(a)(5), the trial court may terminate a father's parental rights to a child born out-of-wedlock if, prior to the filing of the petition, the father has not done any of the following:

> a. Filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; provided, the petitioner or movant shall inquire of the Department of Health and Human Services as to whether such an affidavit has been so filed and the Department's certified reply shall be submitted to and considered by the court.
>
> b. Legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose.
>
> c. Legitimated the juvenile by marriage to the mother of the juvenile.
>
> d. Provided substantial financial support or consistent care with respect to the juvenile and mother.
>
> e. Established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

Id. "The petitioner bears the burden of proving a father has failed to take any of the four actions enumerated under N.C. Gen. Stat. § 7B-1111(a)(5)." *In re I.S.*, 170 N.C. App. 78, 88, 611 S.E.2d 467, 473 (2005). The trial court "must make specific findings of fact as to [each] subsection[.]" *Id.*

We agree with Respondent-Father that DSS adduced no evidence to support a finding that the children were born out-of-wedlock or that,

at the time its petition was filed on 16 March 2017, Respondent-Father had not filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; legitimated or filed a petition to legitimate the children pursuant to N.C. Gen. Stat. §§ 49-10, -12.1; legitimated the children by marriage to the mother; or established paternity through a judicial proceeding.

While Mr. Locklear testified Respondent-Father had paid no child support or provided gifts or clothes for the children since their arrival in foster care, this minimal proffer does not suffice to meet DSS' burden of proof to support an adjudication under N.C. Gen. Stat. § 7B-1111(a)(5). *See J.M.K.*, 2018 WL 4200535 at *3.

No evidence in the record supports the trial court's adjudication under N.C. Gen. Stat. § 7B-1111(a)(5). We need not address Respondent-Father's exceptions to the trial court's fact-finding in support of this ground. The adjudication is reversed. *See id.*

VI. Willful Lack of Progress

[2] Respondent-Father also challenges the trial court's statement in Finding 85 that he "willfully left the children in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led to the children's removal[,]" insofar as this statement constitutes a conclusion of law of the existence of a ground for terminating his parental rights under N.C. Gen. Stat. § 7B-1111(a)(2). *Cf. generally Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) ("The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review.").

Respondent-Father contends the court's Conclusion of Law 3 demonstrates that it adjudicated just a single ground for terminating his parental rights under N.C. Gen. Stat. § 7B-1111(a)(5) and "did not actually rely on the grounds in N.C. Gen. Stat. § 7B-1111(a)(2)[.]" He further asserts that any adjudication under N.C. Gen. Stat. § 7B-1111(a)(2) would be "improper . . . , because [DSS'] TPR petition did not allege this as a ground for terminating his rights."

DSS argues Finding 85 "recite[s] the language of" N.C. Gen. Stat. § 7B-1111(a)(2), and that the court's failure to repeat this language in Conclusion of Law 3 amounts to "a non-prejudicial clerical error." We need not resolve whether the court adjudicated the existence of § 7B-1111(a)(2) as a ground for termination. The record shows and we

conclude DSS' TPR petition failed to allege that Respondent-Father did not make reasonable progress as a ground for terminating his parental rights.

Under N.C. Gen. Stat. § 7B-1104(6) (2017), a petition to terminate parental rights must state " '[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.' " *In re Humphrey*, 156 N.C. App. 533, 539, 577 S.E.2d 421, 426 (2003) (quoting statute). This Court previously stated: "[w]hile there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to *what acts, omissions or conditions are at issue*." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002) (emphasis supplied).

In the case of *In re B.L.H.*, this Court further explained that,

> [w]here the factual allegations in a petition to terminate parental rights *do not refer to a specific statutory ground for termination*, the trial court may find any ground for termination under N.C.G.S. § 7B-1111 as long as the factual allegations in the petition give the respondent sufficient notice of the ground. However, *where a respondent lacks notice* of a possible ground for termination, it is error for the trial court to conclude such a ground exists.

190 N.C. App. 142, 147, 660 S.E.2d 255, 257-58, *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008) (emphasis supplied). In relevant part, N.C. Gen. Stat. § 7B-1111(a)(2) authorizes the termination of parental rights upon a finding that

> [t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.

N.C. Gen. Stat. § 7B-1111(a)(2).

DSS' TPR petition alleges thirteen numbered paragraphs, setting forth the procedural history of the case, demonstrating the basis for DSS' standing to seek termination under N.C. Gen. Stat. § 7B-1103(a)(3) and satisfying the other formal requirements for a petition in N.C. Gen. Stat. § 7B-1104(1)-(7) (2017). Paragraph 3 alleges that "a Juvenile Petition and Non-Secure Custody Order were filed on October 30, 2014, alleging that [Imogen and Liam] are neglected juveniles . . . ." Paragraph

4 alleges that the children were adjudicated dependent on 2 September 2015. Paragraph 5(a) alleges that DSS "has been awarded custody of the minor children . . . by a court of competent jurisdiction" as shown by an order purportedly attached as an exhibit to the petition, but which is not included in the record on appeal.

Paragraph 12 of the TPR petition identifies the specific factual bases alleged by DSS for terminating the parents' rights, as follows:

> 12. *Facts sufficient to warrant a determination that one or more grounds for terminating parental rights exist under N.C.G.S. 7B-1111 are as follows*:
>
> a) That the alleged father . . . of the children born out of wedlock has not, prior to the filing of a petition or motion to terminate his parental rights, done any of the following: (a) filed an affidavit of paternity in a central registry maintained by the Department of Health and Human Services (b) Legitimated the juvenile[s] pursuant to provisions of N.C.G. S. 49-10, N.C. G. S. 49-12.1, or filed a petition for this specific purpose (c) Legitimated the juvenile[s] by marriage to the mother of the juveniles' [sic] (d) Provided substantial financial support or consistent care with respect to the juveniles' [sic] and mother (e) Established paternity through N.C.G.S. 49-14, 110-132, 130A-101, 130A-118, OR other judicial proceeding.
>
> b) The mother . . . is incapable of providing for the proper care and supervision of the children, such that the children are dependent children, and there is a reasonable probability that such incapability will continue for the foreseeable future.

(Emphasis supplied). *See* N.C. Gen. Stat. § 7B-1111(a)(5), (6) (2017).

Paragraph 12, and the body of the TPR petition more generally, make no reference to Respondent-Father's willful failure to make reasonable progress in correcting the conditions that led to the children's removal from the mother's care. This petition cannot be said to provide "sufficient notice" to Respondent-Father of violation of failure to comply with N.C. Gen. Stat. § 7B-1111(a)(2) as a potential ground to terminate of his parental rights. *In re B.L.H.*, 190 N.C. App. at 147, 660 S.E.2d at 257.

DSS directs this Court to the petition's Exhibit D, a fifteen-page affidavit signed by Mr. Locklear. Exhibit D is incorporated by reference into the body of the petition as follows:

> 10. That the last known address of the mother . . . is as stated above, the efforts of the Petitioner to unite the juveniles' [sic] with their mother are as set out in Affidavit of Darryl Locklear, Social Worker III, a copy of which is attached to this original Petition marked Exhibit "D", to be taken as part of this paragraph as if fully set out herein.
>
> 11. That the last known address of the alleged father, [Respondent-Father], is as stated above, the efforts of the Petitioner to unite the juveniles' [sic] with their alleged father are as set out in Affidavit of Darryl Locklear, Social Worker III, a copy of which is attached to this original Petition marked Exhibit "D", to be taken as part of this paragraph as if fully set out herein.

N.C. Gen. Stat. § 7B-1104(3) provides that, if the names or addresses of a juvenile's parents are unknown, a petition for termination of parental rights "shall set forth with particularity the petitioner's . . . efforts to ascertain the . . . whereabouts of the parent or parents." *Id.* N.C. Gen. Stat. § 7B-1104(3) further provides that "[t]he information may be contained in an affidavit attached to the petition . . . and incorporated by reference." *Id.*

Mr. Locklear's affidavit details his activities related to the family's case between November 2014 and January 2017. Although dozens of the affidavit's 152 numbered paragraphs make some reference to Respondent-Father, the great majority do not. The affidavit recounts (1) Mr. Locklear's efforts in developing Respondent-Father's OHSA and contacting or attempting to contact Respondent-Father by mail and by phone; (2) Respondent-Father's statements to Mr. Locklear; (3) Respondent-Father's absence from, or attendance of, a particular meeting or hearing; and (4) statements about Respondent-Father made by the maternal grandmother, Respondent-Father's therapist, and the children's therapist. The affidavit concludes with the following averments about Respondent-Father:

> 150. The father . . . refuses to make regular contact with the agency. The social worker is unable to assess all his needs but is aware of domestic violence issues, substance abuse concerns and issues with parenting.
>
> 151. The father did meet with worker and agreed to complete substance abuse assessment/counseling, domestic violence assessment/counseling and mental health assessment/counseling.

In the case of *In re D.C.*, 183 N.C. App. 344, 644 S.E.2d 640 (2007), this Court addressed the sufficiency of the allegations in DSS' petition in a juvenile abuse, neglect, or dependency proceeding. In *D.C.*, DSS filed a petition alleging that D.C. was a neglected juvenile based upon, *inter alia*, the respondent leaving the sixteen-month-old child "unsupervised in a motel room where she was later found by a motel employee." *D.C.*, 183 N.C. App. at 347, 644 S.E.2d at 641. Before the petition was heard, the respondent gave birth to C.C. *Id.* at 348, 644 S.E.2d at 642. When C.C. was two days old, DSS filed a petition alleging she was a dependent juvenile. *Id.*

As is common in abuse, neglect, and dependency proceedings, DSS used a form petition and checked the box indicating an allegation of dependency. *Id.* at 350, 644 S.E.2d at 643. In an attachment to the petition,

> DSS incorporated verbatim all the allegations made with respect to respondent's care of D.C. and also alleged that respondent (1) received sporadic prenatal care for C.C., (2) refused to divulge the identity of C.C.'s father, (3) does not possess a crib, diapers, clothes, or formula for C.C., and (4) is incapable of providing care for a newborn.

Id. at 348, 644 S.E.2d at 642. The trial court subsequently adjudicated D.C. and C.C. to be neglected juveniles. *Id.*

On appeal, this Court affirmed D.C.'s adjudication as neglected, based upon the respondent having left the child unattended in a hotel room. *Id.* at 353, 644 S.E.2d at 645. However, this Court reversed C.C.'s adjudication as neglected, and concluded the allegations in the petition were insufficient under the precedent of *Hardesty* to give the respondent notice of an allegation of neglect in addition to the explicit allegation of dependency made in the petition. *Id.* at 350, 644 S.E.2d at 643 (citing *Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82).

The Juvenile Code defines a neglected juvenile, *inter alia*, as one who "does not receive proper care" from her parent and expressly makes "relevant" to the neglect inquiry the fact that the "juvenile lives in a home . . . where another juvenile has been subjected to . . . neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (2017). Nevertheless, this Court in *D.C.* deemed the allegations in the petition's attachment, which included the respondent's neglect of D.C., C.C.'s lack of regular prenatal care, and the respondent's lack of basic items necessary for newborn C.C.'s care, as "insufficient to put respondent on notice that both dependency *and neglect* of C.C. would be at

issue during the adjudication hearing." *D.C.*, 183 N.C. App. at 350, 644 S.E.2d at 643. This Court further

> emphasize[d] that this holding is not based on DSS's mere failure to "check the box" for "neglect" on the form petition. While it is certainly the better practice for the petitioner to "check" the appropriate box on the petition for each ground for adjudication, if the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate. In this case, the box for "neglect" was not checked, *and* the factual allegations, while supporting the claim of dependency, did not *clearly allege* the separate claim of neglect.

Id. (emphasis original).

This Court's holding in *D.C.* supports our conclusion that DSS' TPR petition failed to provide adequate notice to Respondent-Father that his failure to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2) was at issue at the termination hearing. The body of the petition designates specific "[f]acts sufficient to warrant a determination that one or more grounds for terminating parental rights exist under N.C. Gen. Stat. 7B-1111" and then lists allegations comprising the grounds for termination under N.C. Gen. Stat. § 7B-1111(a)(5).

While the petition incorporates Mr. Locklear's affidavit by reference, it characterizes this attachment as an account of "the efforts of the Petitioner to unite the juveniles' [sic] with their mother" and Respondent-Father. The affidavit makes no mention of Respondent-Father's "progress," much less his lack of "reasonable progress under the circumstances . . . in correcting those conditions which led to the removal of the juvenile[s]" from the mother's home. N.C. Gen. Stat. § 7B-1111(a)(2). A fair review of the TPR petition suggests the affidavit was intended to satisfy the requirements of N.C. Gen. Stat. § 7B-1104(3), rather than to state the facts supporting grounds for termination under N.C. Gen. Stat. § 7B-1104(6).

VII. Conclusion

Respondent-Father was not provided prior notice that N.C. Gen. Stat. § 7B-1111(a)(2) was a potential ground for terminating his parental rights. The trial court erred to the extent it relied upon this ground. *See J.M.K.*, 2018 WL 4200535 at *2; *B.L.H.*, 190 N.C. App. at 148, 660 S.E.2d at 258. In the absence of findings of facts supporting any valid adjudication

of Respondent that grounds exist to terminate his parental rights under N.C. Gen. Stat. § 7B-1111(a), the trial court's order is reversed. *It is so ordered.*

REVERSED.

Judges CALABRIA and ZACHARY concur.

IN THE MATTER OF Y.I., J.I.

No. COA18-654

Filed 4 December 2018

1. Child Custody and Support—best interests—custody to one parent—parents' respective progress

The trial court did not abuse its discretion by determining it was in the children's best interest to award custody to their father where the children had been adjudicated neglected and dependent based on physical abuse by the mother's boyfriend. At the time of the permanency planning hearing, the mother was not actively participating in her case plan and was not working with the department of social services (DSS), while the father had contacted DSS as soon as he heard of the children's removal and had done everything DSS had asked of him to ensure a safe home for the children.

2. Appeal and Error—waiver—argument—failure to provide support

Respondent mother did not present a meritorious challenge to the trial court's retention of jurisdiction in a juvenile proceeding where she argued that the trial court did not analyze whether the case should have been transferred to a Chapter 50 proceeding but she did not provide support for her assertion.

3. Child Visitation—conditions—supervised—burden of cost

The trial court erred by ordering that visitation between a mother and her children occur at a supervised visitation center without addressing the costs, who must pay, and whether the mother had the ability to do so.

Appeal by respondent-mother from order entered 10 April 2018 by Judge Joseph Williams in Union County District Court. Heard in the Court of Appeals 8 November 2018.

IN RE Y.I.

[262 N.C. App. 575 (2018)]

Perry, Bundy, Plyler & Long, LLP, by Ashley J. McBride and Dale Ann Plyler, for petitioner-appellee Union County Division of Social Services.

Parent Defender Wendy Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for respondent-appellant mother.

No brief filed for guardian ad litem.

ZACHARY, Judge.

Respondent-mother appeals from an order awarding custody of her minor children, Y.I. ("Yvan") and J.I. ("John"), to their father, "Jasper."[1] We affirm in part, vacate in part and remand.

John was born in April 2008, and Yvan was born in September 2009. On 3 November 2016, the Union County Division of Social Services ("DSS") received a report that the children had witnessed Respondent-mother's boyfriend, "Alex," punching, kicking, and dragging Respondent-mother. Both children also reported having been physically abused by Alex. On 27 March 2017, DSS received another report that Respondent-mother had injuries to her right eye and right arm that resulted from being assaulted by Alex. A social worker helped Respondent-mother and the children get admitted to a domestic violence shelter, but Respondent-mother left the shelter with the children within hours after their admission and returned to Alex's residence.

On 28 March 2017, DSS filed juvenile petitions alleging that the children were neglected and dependent. DSS received nonsecure custody of the children. Following a 24 May 2017 adjudicatory and dispositional hearing, the trial court entered its 26 June 2017 order adjudicating the children to be neglected and dependent and ordering Respondent-mother, *inter alia*, to comply with her case plan, complete a psychological evaluation and comply with any resulting recommendations, complete domestic violence counseling, and engage in parenting classes.

The trial court held a permanency planning hearing on 7 March 2018, after which the court entered an order on 10 April 2018 awarding custody of the children to Jasper, as well as relieving DSS and the attorneys of record of any further responsibility in the case. Respondent-mother filed written notice of appeal on 19 April 2018.

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1. Pseudonyms are used throughout the opinion to protect the identity of the juveniles and for ease of reading.

Standard of Review

"[Appellate] review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citations omitted).

Award of Custody

[1] Respondent-mother first contends that the trial court erred in failing to return custody of the children to her. We disagree.

At any permanency planning hearing, the Juvenile Code permits the trial court to "place the child in the custody of either parent . . . found by the court to be suitable and found by the court to be in the best interests of the juvenile." N.C. Gen. Stat. § 7B-906.1(i) (2017). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015) (citation and quotation marks omitted).

In the present case, the trial court made the following findings relevant to its determination that custody with Jasper was in the children's best interests:

> 8. Some of the issues that led to the removal of the children from the home of [Respondent-mother] . . . included Domestic Violence and Mental Health Concerns. The court has consistently ordered [Respondent-mother] to participate in Domestic Violence Counseling, Address the Mental Health concerns and participate in parenting classes.
>
> 9. [Respondent-Mother] has made it clear to DSS that she does not intend to participate in parenting classes.
>
> 10. [Respondent-mother] participated in a psychological assessment with Dr. Popper which was completed in October of 2017. [Respondent-mother] has been identified as having PTSD which she attributes to the Domestic Violence between herself and [Jasper].
>
> 11. Dr. Popper is of the opinion that [Respondent-mother] is reluctant to examine herself as to what steps she can take, because she is a victim of Domestic Violence.

12. [Respondent-mother] is reluctant to engage in Domestic Violence Counseling and Parenting Classes because Dr. Popper did not specifically recommend those services. [Respondent-mother] has not made substantial progress to address the issues that caused the juveniles to be removed from her home.

. . . .

15. The juveniles were placed with [their paternal aunt] from September 8, 2017 until February 14, 2018 at which time they were moved to the home of [Jasper].

16. Since being [with Jasper] in Catawba County the juveniles have made significant progress with their educational needs. [John] is no longer in need of an Individual Education Plan.

17. [Jasper] did not originally participate in this matter because he was not aware that the juveniles were in Foster Care. He resided in Mexico.

18. When [Jasper] learned that the juveniles were in Foster Care in or around August of 2017, he returned to North Carolina and immediately began working with DSS on an Out of Home Services Agreement.

19. [Jasper] has completed the Triple P Parenting program and has completed counseling to address prior domestic violence with [Respondent-mother].

. . . .

23. [Respondent-mother] is not making adequate progress within a reasonable period of time under the plan.

24. [Jasper] is making adequate progress within a reasonable period of time under the plan.

25. [Respondent-mother] is not actively participating in or cooperating with the plan, DSS, and the guardian ad litem for the juveniles.

26. [Jasper] is actively participating in or cooperating with the plan, DSS, and the guardian ad litem for the juveniles.

27. (A) The juveniles' return [to] the home of [Respondent-mother] would be contrary to the juveniles' best interest.

. . . .

28. The following progress has been made toward alleviating or mitigating the problems that necessitated placement: [Jasper] has completed parenting classes, followed all activities outlined in his Out of Home Services Agreement and secured safe and stable housing. [Respondent-mother] has completed a comprehensive phycological [sic] exam.

. . . .

33. The court has been presented sufficient evidence and thus finds that the juveniles will receive proper care and supervision in a safe home if they are allowed [to] return to the legal and physical custody of [Jasper].

34. It is in the juveniles' best interest for their custody to be granted to [Jasper].

Respondent-mother first appears to challenge the statement in finding 8 that domestic violence was one of the issues that led to the removal of the children from her home. Setting aside the fact that Respondent-mother fails to specifically challenge this statement as unsupported by the evidence, we nonetheless find support in the trial court's 26 June 2017 adjudicatory order, wherein the court stated that it was adjudicating the children to be neglected juveniles, based in part on the fact that Respondent-mother "has been the victim of Domestic Violence perpetrated by the father of the juveniles, [Jasper]." The order further stated that Respondent-mother was "in need of domestic violence counseling as [a] caretaker[ ] of the juveniles." At the permanency planning hearing, a DSS social worker confirmed that "part of the concern when these children came into DSS custody was domestic violence altercations between [Respondent-mother] and [her domestic partner.]" Thus, the challenged statement is supported by the trial court's 26 June 2017 order and testimony from the permanency planning hearing.

Respondent-mother further contends that findings 12, 23, and 26 "are contrary to the evidence presented[,]" but wholly fails to support her contention with explanation or citation to the record. To the extent Respondent-mother purports to challenge these findings, she has abandoned her challenge. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Respondent-mother does not purport to challenge any of the trial court's other findings, and those findings are therefore binding on appeal. *In re C.B.*, 180 N.C. App. 221,

223, 636 S.E.2d 336, 337 (2006), *aff'd per curiam*, 361 N.C. 345, 643 S.E.2d 587 (2007).

The trial court's findings demonstrate that once Jasper learned of the children's removal from the home, he immediately began working with DSS and had completed all that was asked of him by the time of the 10 April 2018 permanency planning hearing. The children were placed with Jasper in February 2018 and thereafter "made significant progress with their educational needs." While Respondent-mother participated in a psychological exam, she had not completed domestic violence or parenting classes. At the time of the hearing, Respondent-mother was not actively participating in her case plan and was not working with DSS or the children's guardian *ad litem*. In light of these findings, we cannot say that the trial court abused its discretion in determining that it was in the children's best interest to award custody to Jasper.

Retention of Juvenile Jurisdiction

[2] Respondent-mother next contends that the trial court erred in failing to transfer the case to a Chapter 50 action. While Respondent-mother frames her argument in this way, the substance of her argument appears to be that the trial court erred in failing to make a specific finding as to whether jurisdiction should be retained. Again, we disagree.

N.C. Gen. Stat. § 7B-911(a) provides that, "[u]pon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to [Chapter 50]." N.C. Gen. Stat. § 7B-911(a) (2017). The statute does not expressly require that the court make a finding as to whether jurisdiction in the juvenile proceeding should be terminated and the matter transferred to a Chapter 50 action. However, in the event the trial court chooses to do so, N.C. Gen. Stat. § 7B-911(b) and (c) specify the findings the court must make and procedures it must follow in order to terminate jurisdiction in the juvenile proceeding and transfer the matter to a Chapter 50 civil case. N.C. Gen. Stat. § 7B-911(b), (c) (2017).

In this case, the trial court did not terminate its jurisdiction in the order and specifically informed the parties of their right to file a motion requesting that the court review the visitation plan, as is required when the trial court retains jurisdiction. *See* N.C. Gen. Stat. § 7B-905.1(d) (2017) ("If the court retains jurisdiction, all parties shall be informed of the right to file a motion for review of any visitation plan[.]"). Respondent-mother does not contend that the trial court erroneously retained jurisdiction, or that the court failed to follow statutory requirements in doing

so. Respondent-mother claims that "[t]he court did not analyze whether or not the case should be transferred to a Chapter 50 proceeding[,]" but provides no support for the assertion. Accordingly, Respondent-mother does not present a meritorious challenge to the trial court's retention of jurisdiction.

Award of Visitation

[3] Lastly, Respondent-mother contends that the trial court erred in ordering that visitation occur at a supervised visitation center without addressing the cost, who would bear the responsibility for payment of that cost, and whether Respondent-mother had the means to do so. We agree.

N.C. Gen. Stat. § 7B-905.1 provides, in pertinent part:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.
>
> . . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(a), (c) (2017).

In the present case, the trial court ordered that:

> Visitation shall take place as follows: [Respondent-mother] shall have visitation with the juveniles 2 times per month for a minimum of one hour each time, supervised by either Gaston County Visitation Center or Carolina Solutions. If arrangements for the visitations do not take place within the next 30 days, then the parties shall motion the case back on for the court to address a visitation plan for [Respondent-mother].

While the trial court adhered to the statutory requirements by setting forth "the minimum length and frequency of the visits and whether the visits shall be supervised[,]" the trial court's order is not specific enough to allow this Court to determine whether the trial court abused its discretion in setting the conditions of visitation. In *In re J.C.*, 368 N.C. 89, 772 S.E.2d 465 (2015) (per curiam), our Supreme Court remanded for additional findings of fact where "[t]he district court made no findings whether [the] respondent mother was able to pay for supervised visitation once ordered[,]" reasoning that "[w]ithout such findings, our appellate courts are unable to determine if the trial court abused its discretion by requiring as a condition of visitation that visits with the children be at [the] respondent mother's expense." *Id.*

In this case, the trial court did not determine what costs, if any, would be associated with conducting supervised visitation at Gaston County Visitation Center or Carolina Solutions. Given that the trial court relieved DSS of any further responsibility in the case, it appears likely that Respondent-mother would be required to pay for visitation, although the court failed to specify who was to bear any such expense. In the event the trial court intended for Respondent-mother to bear the cost of visitation, the court failed to determine whether Respondent-mother had the ability to pay. As a result, we vacate the portion of the permanency planning order regarding visitation and remand for additional findings of fact, addressing whether Respondent-mother is to bear any costs associated with conducting visits at the supervised visitation centers, and if so, whether Respondent-mother has the ability to pay those costs.

Conclusion

In sum, we vacate the portion of the order establishing a visitation plan and remand for further findings of fact. The trial court may, in its discretion, hold additional hearings in this matter to address these issues. The remainder of the trial court's order is affirmed.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges CALABRIA and TYSON concur.

SAM LAMBERT AND ANDRIA LAMBERT, PLAINTIFFS
v.
SALLY MORRIS AND STEVE HAIR, DEFENDANTS

No. COA18-189

Filed 4 December 2018

Animals—lost—dog—adoption—statutory procedure

The trial court's dismissal of plaintiffs' tort claims against defendant for not returning their lost dog was affirmed, where Animal Control satisfied its statutory duty (N.C.G.S. § 19A-32.1) to hold plaintiffs' lost dog for a minimum of 72 hours, after which time plaintiffs lost any ownership rights in the dog and defendant became the dog's lawful owner through a formal adoption.

Appeal by plaintiffs from order entered 16 August 2017 by Judge Michael L. Robinson in Stanly County Superior Court. Heard in the Court of Appeals 2 October 2018.

Carruthers & Roth, P.A., by Brandon K. Jones and Richard L. Vanore, for plaintiffs-appellants.

Bolster Rogers, PC, by Melissa R. Monroe and Jeffrey S. Bolster, for defendants-appellees.

BRYANT, Judge.

Where plaintiffs did not demonstrate genuine issues of material fact, the trial court did not err in granting summary judgment.

Plaintiffs Sam Lambert and Andria Lambert filed an action against defendants Sally Morris and Steve Hair alleging conversion, civil conspiracy, unfair and deceptive trade practices, and intentional or reckless infliction of emotional distress. Plaintiffs also sought injunctive relief and damages related to the disappearance of their dog, Biscuit.

On 16 August 2015, Biscuit went missing from plaintiffs' residence in Stanly County. Plaintiffs attempted to locate Biscuit for several days before initiating contact with Jimmy Medlin of the Montgomery County Animal Control ("Animal Control") on or about 19 August 2015. Plaintiffs informed Medlin that a photograph of Biscuit was posted on Animal Control's unofficial Facebook page and asked if Biscuit was there. Medlin checked their records and told plaintiffs they did not have

a record of Biscuit. Plaintiffs continued to follow up with the unofficial Facebook page periodically for news of Biscuit.

Over a month later, on 2 October 2015, a citizen brought Biscuit to Animal Control where she was placed in one of Animal Control's holding cells located on the Montgomery County Humane Society's ("Humane Society") property. Biscuit did not have a microchip or a collar to identify the owners. Biscuit was held for 72 hours under the possession of Animal Control. After the 72-hour period, on 5 October 2015, Animal Control transferred possession of Biscuit to the Humane Society.[1] The Humane Society often takes possession of animals after the 72-hour period and finds available homes for them.

The next day, on 6 October 2015, a volunteer with the Humane Society took Biscuit to a veterinarian for examination and spaying. On 7 October 2015, a picture of Biscuit was posted by the Humane Society on its website where it remained until Biscuit was adopted. Meanwhile, it was discovered that Biscuit had tumors in her mammary glands and on 20 October 2015, she was taken to the Asheboro Animal Hospital to have them surgically removed. Then, on 30 October 2015, defendant Hair formally adopted Biscuit by completing an adoption application with the Humane Society. Defendant Hair reimbursed the Humane Society for some of Biscuit's veterinary bills while in the care of the Humane Society.

Approximately four weeks after Biscuit was adopted, defendant Hair decided to let defendant Morris foster Biscuit because of problems Biscuit was having interacting with defendant Hair's other rescue dogs. Defendant Morris brought Biscuit to the Humane Society about "two to three times a week."

Almost a year later, in June 2016, plaintiffs found an old Facebook posting of Biscuit at the Humane Society and attempted to claim Biscuit. Defendant Hair requested that plaintiffs needed to reimburse him for Biscuit's vet bills while in the care of the Humane Society if he gave Biscuit to them, which plaintiffs agreed.

Defendant Hair requested to speak with plaintiffs' veterinarian, but plaintiffs were unable to reach him. Defendant Hair did not feel comfortable giving Biscuit back to plaintiffs when plaintiffs indicated that they had over fourteen dogs. Defendant Hair stated he would not return Biscuit to plaintiffs before conducting a home visit. The exchange

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1. Defendant Morris was the Vice President/Secretary and Treasurer for the Humane Society and Defendant Hair was the President.

between plaintiffs and defendant Hair became heated. Defendant Hair eventually ended the meeting and told plaintiffs to leave. Defendant Hair refused to return Biscuit and did not proceed any further with the home inspection.

On 22 July 2016, plaintiffs filed their action against defendants. During negotiations, defendant Hair agreed to return Biscuit to plaintiffs to resolve the lawsuit, however he later declined and the parties proceeded with the action. On 14 August 2017, the action was heard before the Honorable Michael L. Robinson on defendants' motion for summary judgment. Judge Robinson issued a written order granting judgment in favor of defendants and dismissed plaintiffs' claims. Plaintiffs appeal.

On appeal, plaintiffs argue the trial court erred in granting summary judgment in favor of defendants and dismissing plaintiffs' claims for: 1) conversion and permanent injunction; 2) civil conspiracy; 3) unfair and deceptive trade practices; 4) intentional or reckless infliction of emotional distress; and 5) punitive damages. We disagree.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

Rule 56 of the North Carolina Rules of Civil Procedure provides that any party is entitled to judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[.]" N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). "In a motion for summary judgment, the evidence presented to the trial court must be . . . viewed in a light most favorable to the non-moving party." *Hart v. Brienza*, 246 N.C. App. 426, 430, 784 S.E.2d 211, 215 (2016) (citations and quotations omitted).

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim . . . . If the moving party meets this burden, the non-moving party must in turn either show that a genuine

> issue of material fact exists for trial or must provide an excuse for not doing so.

Id.

North Carolina General Statutes, section 19A-32.1 provides for procedures an animal shelter must follow upon receiving a lost or abandoned animal. N.C. Gen. Stat. § 19A-32.1 (2017). The statute, in pertinent part, states "all animals received by an animal shelter or by an agent of an animal shelter shall be held for a minimum holding period of 72 hours." *Id.* § 19A-32.1(a). "[A] person who comes to an animal shelter [within the minimum holding period] attempting to locate a lost pet is entitled to view every animal held at the shelter, subject to rules providing for such viewing during at least four hours a day, three days a week." *Id.* § 19A-32.1(c).

> After the expiration of the minimum holding period, the shelter may (i) direct the agent possessing the animal to return it to the shelter, (ii) allow the agent to adopt the animal consistent with the shelter's adoption policies, or (iii) extend the period of time that the agent holds the animal on behalf of the shelter.

Id. § 19A-32.1(e).

Plaintiffs allege many causes of action, all of which are based on whether defendant Hair's adoption of Biscuit was properly conducted. In its extensive order granting summary judgment to defendants, the trial court viewed the issue before it as follows: "whether [] defendants' evidence that the adoption of [p]laintiffs' lost dog 'Biscuit' was properly conducted pursuant to applicable law has been sufficiently rebutted by [p]laintiffs' evidence to create an issue for jury determination, thus mandating denial of the Motion." The trial court determined that plaintiffs' evidence, challenging defendant Hair's adoption of Biscuit, did not create genuine issues of material fact. As the trial court determined and we agree, Animal Control satisfied its legal duty as Biscuit remained in its custody for the required statutory holding period and was acquired by the Humane Society *only after* the expiration of 72 hours.

By law, it is permissible for Animal Control to euthanize animals after the 72-hour period. *See id.* § 19A-32.1(a). However, as defendants established, it is also customary for Animal Control to transfer animals to the Humane Society for the purpose of finding new available homes. After the minimum holding period, Animal Control has the legal authority to *either* euthanize *or* transfer possession to initiate adoption. It is

made clear by the statute that after the 72-hour holding period, prior ownership can be legally severed and a formal adoption can begin before euthanasia is considered.

Plaintiffs lost any ownership rights to Biscuit after the first 72 hours Biscuit was in the possession of Animal Control.[2] Once the Humane Society received Biscuit and initiated a formal adoption to a third party—in this case, defendant Hair—almost a month had passed since Biscuit was in the possession of Animal Control.

It is undisputed that defendant Hair was the rightful owner of Biscuit, and we agree with the statement of the trial court that "[d]efendant Hair, as the [rightful] owner of [Biscuit], was entitled to negotiate with [p]laintiffs in whatever fashion he desired" in deciding whether to return Biscuit to plaintiffs or keep her and "this conduct was solely as an individual . . . not on behalf of the Humane Society." Therefore, defendants have successfully rebutted plaintiffs' allegations of tortious conduct and demonstrated that there exist no genuine issues of material fact.

Accordingly, the trial court did not err in granting summary judgment to defendants and dismissing plaintiffs' claims.

AFFIRMED.

Judges DIETZ and INMAN concur.

2. We again note that Biscuit had no identifying chip or collar when she arrived at Animal Control.

MARJORIE C. LOCKLEAR, PLAINTIFF
v.
MATTHEW S. CUMMINGS, M.D., SOUTHEASTERN REGIONAL MEDICAL CENTER, DUKE UNIVERSITY HEALTH SYSTEM AND DUKE UNIVERSITY AFFILIATED PHYSICIANS, INC., DEFENDANTS

No. COA16-1015-2

Filed 4 December 2018

1. Pleadings—Rule 9(j) certification—motion to amend—motions to dismiss

In a medical malpractice case, the trial court erred by denying plaintiff's motion to amend her complaint to include the proper Rule 9(j) certification and by dismissing plaintiff's claims. Plaintiff inadvertently used certification language from a prior version of Rule 9(j), and her motion to amend was accompanied by affidavits averring that her experts' review occurred prior to the filing of the original complaint.

2. Civil Procedure—Rule 4—service of process—private process server

In a medical malpractice case, the trial court properly dismissed plaintiff's claims against defendant medical center where she used a private process server instead of the sheriff to serve defendant with the complaint. Private process service is authorized by statute only when the sheriff is unable to fulfill the duties of a process server, a showing not met here. Although plaintiff's process server filed an affidavit pursuant to Rule 4, a self-serving affidavit does not itself create authority for an affiant.

Judge BERGER concurring in part and dissenting in part.

Appeal by Plaintiff from orders entered 2 February 2016 and 4 February 2016 by Judge James Gregory Bell in Robeson County Superior Court. Heard in the Court of Appeals 8 March 2017. By opinion issued 16 May 2017, a divided panel of this Court reversed in part and affirmed in part the trial court's grant of Defendants' motions to dismiss. In an opinion filed 17 August 2018, the Supreme Court of North Carolina reversed and remanded the case to the Court of Appeals for reconsideration in light of the Supreme Court's decision *Vaughan v. Mashburn*, ___ N.C. ___, 817 S.E.2d 370 (2018).

Law Offices of Walter L. Hart, IV, by Walter L. Hart, IV, for Plaintiff-Appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, David D. Ward, and Katherine Hilkey-Boyatt, for Defendant-Appellees Matthew S. Cummings, M.D., Duke University Health System, and Duke University Affiliated Physicians, Inc.

Brotherton Ford Berry & Weaver, PLLC, by Robert A. Ford and Demetrius Worley Berry, for Defendant-Appellee Southeastern Regional Medical Center.

HUNTER, JR., Robert N., Judge.

Marjorie C. Locklear ("Plaintiff") appeals from an order dismissing her complaint against Defendants Dr. Matthew Cummings, Duke University Health System, and Duke University Affiliated Physicians (collectively "Duke Defendants") under Rule 9(j), as well as the denial of her motion to amend under Rule 15(a). Plaintiff also appeals from an order dismissing her complaint against Defendant Southeastern Regional Medical Center ("Southeastern") under Rules 9(j) and 12(b)(5), as well as the denial of her motion to amend under Rule 15(a). After review, we vacate and remand in part and affirm in part.

I. Factual and Procedural Background

On 30 July 2015, one day before the statute of limitations expired, Plaintiff filed a complaint against Defendants, seeking monetary damages for medical negligence. The complaint alleges the following narrative.

On 31 July 2012, Dr. Cummings performed cardiovascular surgery on Plaintiff. During surgery, Dr. Cummings failed to monitor and control Plaintiff's body and was distracted. Additionally, he did not position himself in close proximity to Plaintiff's body. While Plaintiff "was opened up and had surgical tools in her[,]" Plaintiff fell off of the surgical table. Plaintiff's head and the front of her body hit the floor. As a result of the fall, Plaintiff suffered a concussion, developed double vision, injured her jaw, displayed bruises, and was "battered" down the left side of her body. Plaintiff also had "repeated" nightmares about falling off the surgical table. Duke Defendants and Defendant Southeastern acted negligently by retaining physicians, nurses, and other healthcare providers who allowed Plaintiff's accident to occur.

In her complaint, Plaintiff included the following, in attempt to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure:

> 24. That the medical care and treatment rendered to Plaintiff by Defendant Cummings on July 31, 2012 has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.
>
> 25. That the medical care and treatment of Defendant Cummings has been reviewed by a person that Plaintiff will seek to have qualified [as] an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to Plaintiff fell below the applicable standard of care.
>
> ….
>
> 34. That the medical care and treatment of Defendant Southeastern Regional Medical Center has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to the decedent fell below the applicable standard of care.
>
> 35. That the medical care and treatment of Defendant Southeastern Regional Medical Center has been reviewed by a person that the Plaintiff will seek to have qualified as an expert witness by Motion under Rule 702 of the North Carolina Rules of Evidence, and who is willing to testify that the medical care rendered to the decedent fell below the applicable standard of care.

On 9 September 2015, private process server, Richard Layton, served Duke Defendants by delivering Plaintiff's civil cover sheet, summons, and complaint to Margaret Hoover, a registered agent for Duke Defendants. On 19 September 2015, Gary Smith, Jr. served Plaintiff's summons and complaint on Dr. Cummings. Lastly, on 24 September 2015, Smith served Plaintiff's summons and complaint on Southeastern by delivering the papers to C. Thomas Johnson, IV, Southeastern's Chief Financial Officer.[1]

1. In Smith's affidavit, he listed Johnson as Southeastern's registered agent.

On 10 November 2015, Dr. Cummings and Duke Defendants filed a joint answer and motion to dismiss. Dr. Cummings and Duke Defendants denied the allegations in Plaintiff's complaint and asserted defenses under Rules 12(b)(6) and 9(j) of the North Carolina Rules of Civil Procedure.

On 23 November 2015, Southeastern filed an answer and denied Plaintiff's allegations. Southeastern moved to dismiss Plaintiff's compliant under Rules 12(b)(4), 12(b)(5), 12(b)(6), and 9(j) of the North Carolina Rules of Civil Procedure. On 29 December 2015, Johnson filed an affidavit. In the affidavit, Johnson swore he was the Chief Financial Officer of Southeastern, but not the corporation's registered agent.

On 8 January 2016, Plaintiff filed notice of submission of affidavits in opposition of Defendants' motions to dismiss. Plaintiff attached nurse Melissa Hannah's affidavit, which stated, *inter alia*:

> 4. I have been retained by counsel for the Plaintiff Marjorie C. Locklear.
>
> 5. I expect to be qualified as a nursing expert for the Plaintiff Marjorie Locklear.
>
> 6. I have reviewed Marjorie Locklear's relevant medical records from Southeastern regional Medical Center for the time period of July 31, 2012 through August 5, 2012.
>
> 6. [sic] From my review of these medical records, I determined that the nursing staff attending Ms. Locklear and assisting Dr. Matthew S. Cummings on July 31, 2012 deviated from the applicable standard of care for nursing personnel in letting Ms. Locklear fall off the catherization table on which she had been placed.
>
> 7. I am ready willing and able to testify as to all relevant issues including those specified above.
>
> 8. I first expressed by opinions in writing on July 28, 2015, by answering and relaying a questionnaire.

Plaintiff also attached Dr. Richard Spellberg's affidavit, which stated, *inter alia*:

> 3. I was retained by the Plaintiff in this action. Marjorie c. Locklear.

> 4. I reviewed Ms. Locklear's medical records from Southeastern Regional Medical Center for the time period of July 31, 2012 through August 5, 2012.
>
> 5. After my review, I orally expressed my opinion to counsel for the Plaintiff on July 21, 2015.
>
> ….
>
> 7. I expect to be qualified as a physician expert for the Plaintiff Marjorie Locklear.
>
> 8. From my review of the medical records specified above, I determined that Matthew S. Cummings, M.D. deviated from the standard of care applicable to Marjorie Locklear and her condition by letting her fall off the catherization table on which she had been placed.
>
> 9. From my review of the medical records specified above, I determined that Dr. Cummings' deviation from the applicable standard of care resulted in injury to Ms. Locklear . . . .
>
> ….
>
> 11. I am ready willing and able to testify as to all relevant issues including those discussed above.

On 11 January 2016, the trial court held a hearing on all Defendants' pending motions. During argument, Plaintiff requested "leave of the Court to amend [the] complaint so that there's no controversy hereafter." Plaintiff asserted she "wishe[d] to allege not just that the medical care and all medical records were reviewed but that the review was conducted prior to the complaint being filed and that a proper review was done." Then, Plaintiff requested leave "pursuant to Rules 15(a) and 60."

On 2 February 2016, the trial court granted Dr. Cummings's and Duke Defendants' motion to dismiss pursuant to Rule 9(j) and denied Plaintiff's motion to amend under Rule 15(a). On 4 February 2016, the trial court granted Southeastern's motion to dismiss pursuant to Rules 9(j) and 12(b)(5) and denied Plaintiff's motion to amend under Rule 15(a). Plaintiff filed timely notice of appeal.

II. Standard of Review

The standard of review of a Rule 12(b)(6) motion to dismiss is *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580

S.E.2d 1, 4 (2003). Likewise, a trial court's order dismissing a complaint pursuant to Rule 9(j) is reviewed *de novo* on appeal because it is a question of law. *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009) (citation omitted).

"A motion to amend is addressed to the discretion of the trial court." *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). "When the trial court's ruling is based on a misapprehension of law, the order will be vacated and the case remanded to the trial court for further proceedings." *Vaughan v. Mashburn*, ___ N.C. ___, ___, 817 S.E.2d 370, ___ (2018) ("*Vaughan II*") (citing *Concerned Citizens of Brunswick Cty. Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991)).

We review the trial court's dismissal under Rule 12(b)(5) *de novo*. *New Hanover Cty. Child Support Enforcement ex rel. Beatty v. Greenfield*, 219 N.C. App. 531, 533, 723 S.E.2d 790, 792 (2012) (citation omitted).

III. Analysis

A. Motions to Dismiss under Rule 9(j) and Motion to Amend under Rule 15

[1] Plaintiff argues the trial court erred in dismissing her complaint against Defendants under Rule 9(j) and denying her motion to amend under Rule 15. We agree.

Rule 9 of the Rules of Civil Procedure governs special pleadings and states:

> (j) Medical malpractice.–Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> > (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
> >
> > (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged

> negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; . . . .

N.C. R. Civ. P. 9(j) (2017).

In her brief, Plaintiff concedes "her counsel inadvertently failed to expressly state this pre-filing evaluation included a review of 'all medical records pertaining to the alleged negligence.' " However, Plaintiff argues she "actually complied with the substantive pre-suit review requirements of Rule 9(j)."

Our Supreme Court recently addressed the interplay between Rule 15 and Rule 9(j) of the North Carolina Rules of Civil Procedure in *Vaughan v. Mashburn*. *Vaughan II*, ___ N.C. ___, 817 S.E.2d 370. In that case, plaintiff filed a complaint for medical malpractice but "inadvertently used the certification language of a prior version of Rule 9(j)[.]" *Id.* at ___, 817 S.E.2d at ___. Specifically, plaintiff's complaint failed to include the following language "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry[,]" as required by the current Rule 9(j). *Id.* at ___, 817 S.E.2d at ___. Consequently, defendants filed a motion to dismiss plaintiff's complaint, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *Id.* at ___, 817 S.E.2d at ___. In response to defendants' motion, plaintiff filed a motion for leave to file an amended complaint. *Id.* at ___, 817 S.E.2d at ___. Plaintiff wanted to amend her complaint to add the one missing sentence required by Rule 9(j), so as to be in compliance with Rule 9(j). *Id.* at ___, 817 S.E.2d at ___. In support of her motion, plaintiff submitted affidavits, indicating an expert "reviewed plaintiff's medical care and related medical records before the filing of plaintiff's original complaint." *Id.* at ___, 817 S.E.2d at ___. The trial court granted defendants' motion to dismiss, denied plaintiff's motion to amend, and dismissed plaintiff's complaint, with prejudice. *Id.* at ___, 817 S.E.2d at ___. Plaintiff appealed.

Our Court affirmed the trial court's order. *Vaughan v. Mashburn*, ___ N.C. App. ___, 795 S.E.2d 781 (2016) ("*Vaughan I*"). Concluding precedent bound the decision, we held "where a medical malpractice 'plaintiff did not file the complaint with the proper Rule 9(j) certification before the running of the statute of limitation, the complaint cannot

have been deemed to have commenced within the statute.' " *Id.* at ___, 795 S.E.2d at 788 (citation and emphasis omitted). Thus, the trial court did not err in denying plaintiff's motion to amend. *Id.* at ___, 795 S.E.2d at 788. Plaintiff filed a petition for discretionary review with the North Carolina Supreme Court. *Vaughan II*, ___ N.C. at ___, 817 S.E.2d at ___. The Supreme Court allowed plaintiff's petition for discretionary review. *Id.* at ___, 817 S.E.2d at ___.

Our Supreme Court reversed this Court's decision. After reviewing the purposes behind Rule 15 and Rule 9(j), the Supreme Court held "a plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a) to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint. Further, such an amended complaint may relate back under Rule 15(c)." *Id.* at ___, 817 S.E.2d at ___. The Supreme Court further stated:

> [w]e again emphasize that in a medical malpractice action the expert review required by Rule 9(j) must occur before the filing of the original complaint. This pre-filing expert review achieves the goal of weed[ing] out law suits which are not meritorious before they are filed. But when a plaintiff prior to filing has procured an expert who meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care, dismissing an amended complaint would not prevent frivolous lawsuits. Further, dismissal under these circumstances would contravene the principle that decisions be had on the merits and not avoided on the basis of mere technicalities.

Id. at ___, 817 S.E.2d at ___ (citations and quotation marks omitted) (alteration and emphasis in original).

In the case *sub judice*, Plaintiff inadvertently used Rule 9(j) certification language from a prior version of the rule, similar to plaintiff in *Vaughan*. After Defendants filed motions to dismiss, Plaintiff filed two affidavits, one by Dr. Spellberg and one by nurse Hannah. At the hearing, Plaintiff requested leave to amend her complaint, because she "wishe[d] to allege not just that the medical care and all medical records were reviewed but that the review was conducted prior to the complaint being filed and that a proper review was done." Following the Supreme Court's holding in *Vaughan II*, we hold the trial court erred in dismissing

Plaintiff's complaint under Rule 9(j) and denying her motion to amend.[2] While Defendants present several arguments in support of affirming the trial court's orders—which would have been persuasive under prior case law—these arguments are based on technicalities. Agreeing with Defendants would violate the holding and spirit of *Vaughan II*. Accordingly, we vacate the trial court's orders dismissing Plaintiff's complaint against Defendants and denying Plaintiff's motion to amend and remand for proceedings not inconsistent with this opinion.[3]

B. Motion to Dismiss under Rule 12(b)(5)

[2] Plaintiff next contends the trial court erred in dismissing her claims against Southeastern under Rule 12(b)(5). We disagree.

Rule 4 of the North Carolina Rules of Civil Procedure governs service of process in North Carolina. Rule 4 states, *inter alia*:

> (a) Summons — Issuance; who may serve.–Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.
>
> . . . .
>
> (h) Summons—When proper officer not available.—If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person

2. Our holding does not conflict with this Court's recent decision, *Fairfield v. WakeMed*, ___ N.C. App. ___, ___ S.E.2d ___ (N.C. Ct. App. Oct. 2, 2018). In *Fairfield*, plaintiff did not file or appeal from a motion to amend. Thus, the holding of *Vaughan II* did not apply, because there was no interplay between Rule 9(j) and Rule 15. Instead, our Court based its decision only on Rule 9(j).

3. The trial court dismissed Plaintiff's complaint against Dr. Cummings and Duke Defendants only under Rule 9(j); thus, we vacate that order. However, the trial court dismissed Plaintiff's complaint against Southeastern under Rule 9(j) *and* Rule 12(b)(5). We vacate the portion of the order decided under Rule 9(j) and affirm the portion of the order decided under Rule 12(b)(5).

> who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.
>
> (h1) Summons—When process returned unexecuted. –If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

N.C. Gen. Stat. § 1A-1, Rule 4 (2016).

Plaintiff argues service by a private process server is permissible under the North Carolina Rules of Civil Procedure if the private process server files an affidavit under N.C. Gen. Stat. § 1-75.10.[4]

Southeastern contends holding Plaintiff's service was proper conflates Rule 4(a) with Rule 4(h) and Rule 4(h1). We agree.

Here, Plaintiff hired a private process server, Smith, to serve Southeastern. On 24 September 2015, Smith served Johnson, the Chief Financial Officer of Southeastern. On 14 October 2015, Smith signed an "Affidavit of Process Server" asserting he was over the age of 18 years, not a party to the action, and "authorized by law to perform said service."

In North Carolina, private process service is not always "authorized under law". The proper person for service in North Carolina is the sheriff of the county where service is to be attempted or some other person duly authorized by law to serve summons. N.C. Gen. Stat. § 1A-1, Rule 4(a). Although Plaintiff's process server filed the statutorily required affidavit, a self-serving affidavit alone does not confer "duly authorized by law" status on the affiant. Legal ability to serve process by private process server is limited by statute in North Carolina to scenarios where the sheriff is unable to fulfill the duties of a process server. N.C. Gen. Stat. § 1A-1, Rule 4(h), (h1). For example, if the office of the sheriff

4. In support of her argument, Plaintiff also cites *Garrett v. Burris*, No. COA14-1257, 2015 WL 4081832 (unpublished) (N.C. Ct. App. July 7, 2015). However, *Garrett* is an unpublished opinion and is not binding authority.

is vacant, the county's coroner may execute service. N.C. Gen. Stat. § 162-5. Additionally, if service is unexecuted by the sheriff under Rule 4(a), the clerk of the issuing court can appoint "some suitable person" to execute service under Rule 4(h). Here, the record does not disclose the sheriff was unable to deliver service so that the services of a process server would be needed. This is commonly accepted statutory practice in North Carolina and discussed in treatises dealing with civil procedure. *See* William A. Shuford, *North Carolina Civil Practice and Procedure* § 4.2 (6th ed.); 1 G. Gray Wilson, *North Carolina Civil Procedure* § 4-4, at 4-16 (2016). Accordingly, we affirm the trial court's order dismissing Plaintiff's claims against Southeastern under Rule 12(b)(5) of the North Carolina Rules of Civil Procedure.

IV. Conclusion

For the foregoing reasons, we vacate the portions of the trial court's orders dismissing Plaintiff's complaint under Rule 9(j) and denying Plaintiff's motion to amend. We affirm the portion of the trial court's order dismissing Plaintiff's complaint against Southeastern under Rule 12(b)(5).

VACATED AND REMANDED IN PART; AFFIRMED IN PART.

Judge CALABRIA concurs.

Judge BERGER dissenting in part in separate opinion, concurring in part.

BERGER, Judge, dissenting in part in separate opinion, concurring in part.

I respectfully dissent from the portion of the majority opinion vacating and remanding the trial court's order that had dismissed Plaintiff's complaint and denied her motion to amend. Otherwise, I concur with the majority.

First and foremost, it must be stressed that "[a] motion to amend the pleadings is addressed to the sound discretion of the trial court[,]" and "[t]he exercise of the court's discretion is not reviewable absent a clear showing of abuse." *Carter v. Rockingham Cnty. Bd. Educ.*, 158 N.C. App. 687, 690, 582 S.E.2d 69, 72 (2003) (citations and quotation marks omitted). Furthermore, in our review of the denial of a motion to amend, a trial court's "ruling is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have

been the result of reasoned decision." *Outer Banks Contractors, Inc. v. Daniels & Daniels Constr., Inc.*, 111 N.C. App. 725, 729, 433 S.E.2d 759, 762 (1993) (citations and quotation marks omitted).

Here, Plaintiff sought to amend her complaint alleging medical malpractice so that it would comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, which states that:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and *all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness* under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and *all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness* by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.
>
> Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district may allow a motion to extend the statute of limitations for a period

> not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension. The plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection. These interrogatories do not count against the interrogatory limit under Rule 33.

N.C. Gen. Stat. § 1A-1, Rule 9 (emphasis added).

"Rule 9(j) of the North Carolina Rules of Civil Procedure dictates the pleading requirements for bringing a medical malpractice action [and] serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 401, 731 S.E.2d 500, 504 (2012) (citation and quotation marks omitted). This Rule also "unambiguously requires a trial court to dismiss a complaint if the complaint's allegations do not facially comply with the rule's heightened pleading requirements." *Norton v. Scotland Mem'l Hosp., Inc.*, ___ N.C. App. ___, ___, 793 S.E.2d 703, 707 (2016) (citation omitted). Our Supreme Court has clarified that the review contemplated by Rule 9(j)(1) and (2) must occur prior to the filing of a medical malpractice complaint to avoid dismissal. *Vaughan v. Mashburn*, ___ N.C. ___, ___, 817 S.E.2d 370, 377 (2018).

Additionally, "[b]ecause the legislature has required strict compliance with this rule, our courts have ruled that if a pleader fails to properly plead his case in his complaint, it is subject to dismissal without the opportunity for the plaintiff to amend his complaint under Rule 15(a)." *Alston v. Hueske*, 244 N.C. App. 546, 553, 781 S.E.2d 305, 310 (2016) (citation omitted); *Keith v. Northern Hosp. Dist. of Surry Cnty.*, 129 N.C. App. 402, 405, 499 S.E.2d 200, 202 (1998). In the drafting of Rule 9(j)(1) and (2), which both require review of "*all* medical records," "[w]e presume that the legislature carefully chose each word used." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (*purgandum*[1]).

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1. Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

The United States Court of Federal Claims gave the best explanation of 'all,' when it wrote:

> 'All' is often used in writing intended to have legal effect as a preface to flexible or imprecise words, as in 'all other property,' 'all the rest and residue,' 'all and every,' 'all speed,' 'all respect.' Its purpose is to underscore that intended breadth is not to be narrowed. 'All' means the whole of that which it defines—not less than the entirety. 'All' means all and not substantially all.

Nat'l Steel & Shipbuilding Co. v. United States, 190 Ct. Cl. 247, ___, 419 F.2d 863, 875 (1969). We therefore must presume that when the legislature wrote 'all medical records,' it meant "all and not substantially all" records. *Id.*

The issue in *Vaughan v. Mashburn*, as here, concerned relation back of Rule 9(j) certification through an amended complaint *after* expiration of the statute of limitations. *Vaughan*, ___ N.C. at ___, 817 S.E.2d at 379. However, the plaintiff in *Vaughan* filed a motion to amend her complaint to assert that "*all* medical records pertaining to the alleged negligence that are available to Plaintiff after reasonable inquiry had been reviewed before the filing of the original complaint." *Id.* (quotation marks omitted) (emphasis added).

Plaintiff here did not allege in her oral motion to amend or in affidavits filed in opposition to defendant's motion to dismiss that her expert witnesses had reviewed "*all* medical records pertaining to the alleged negligence that are available to Plaintiff." The record contains an unsworn, undated affidavit of Dr. Richard D. Spellberg, who stated that he had "reviewed Ms. Locklear's medical records from Southeastern Regional Medical Center for the time period of July 31, 2012 through August 5, 2012" on July 27, 2017. His answers to a written questionnaire attached to the unsworn, undated affidavit indicate that he "reviewed Marjorie Locklear's medical records" for the same location and time period.

Similarly, Plaintiff provided the affidavit of nurse Melissa L. Hannah. Ms. Hannah swore that she had reviewed Plaintiff's "*relevant* medical records from Southeastern regional [*sic*] Medical Center for the time period of July 31, 2012 through August 5, 2012." Ms. Hannah also completed a questionnaire in which she confirmed that she had reviewed Plaintiff's "*relevant* medical records."

Neither potential expert certified by affidavit or otherwise stated that they had reviewed *all* of Plaintiff's medical records relating to the

alleged medical malpractice. Dr. Spellberg simply alleged that he had reviewed Plaintiff's medical records, but does not state he reviewed *all* of Plaintiff's medical records concerning the alleged negligence. Ms. Hannah stated that she had reviewed only medical records she deemed to be *relevant* for that same time period. Neither meet the certification requirements of Rule 9(j). Because Plaintiff did not assert that a potential expert witness had reviewed "*all* medical records pertaining to the alleged negligence" prior to the filing of the original complaint, she has not satisfied the requirements of Rule 9(j) as clarified by *Vaughan*. Any complaint that fails to comply with the certification requirements "shall be dismissed." N.C. Gen. Stat. § 1A-1, Rule 9(j).

> Plaintiff alleged that her care and treatment occurred July 31, 2012, and she filed her action July 30, 2015, one day before the statute of limitations would expire. Plaintiff's medical malpractice complaint failed to include a required Rule 9(j) certification regarding review of medical records.
>
> Plaintiff failed to seek amendment of her complaint until January 11, 2016, nearly six months after the statute of limitations had expired, and 44 days beyond [t]he 120-day extension of the statute of limitations available to medical malpractice plaintiffs by Rule 9(j) . . . for the purpose of complying with Rule 9(j). Allowing an amendment would have been futile, so it cannot be said that the trial court abused its discretion in denying that motion. Plaintiff failed to plead proper Rule 9(j) certification in her complaint before the statute of limitations expiration. If any complaint alleging medical malpractice shall be dismissed for failure to comply with the certification mandate of Rule 9(j), it cannot be said that the trial court erred in granting Defendants' motion to dismiss.

Locklear v. Cummings, ___ N.C. App. ___, ___, 801 S.E.2d 346, 355-56 (2017) (Berger, J., concurring in part and dissenting in part) (citation and quotation marks omitted), *reversed*, ___ N.C. ___, 817 S.E.2d 571 (2018).

OCEAN POINT UNIT OWNERS ASS'N, INC. v. OCEAN ISLE W. HOMEOWNERS ASS'N, INC.

[262 N.C. App. 603 (2018)]

OCEAN POINT UNIT OWNERS ASSOCIATION, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, PLAINTIFF
v.
OCEAN ISLE WEST HOMEOWNERS ASSOCIATION, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA17-1289

Filed 4 December 2018

1. Pleadings—notice—identity of subject matter—sufficiency of allegations

In an action to determine the rights and duties bestowed by an easement, plaintiff condo association's allegations were sufficient to put defendant neighboring homeowners association on notice regarding the identity of the card gate facility plaintiff alleged was wrongfully installed by defendant.

2. Parties—standing—real party in interest—condo association—suing on behalf of constituent members

In an action to determine the rights and duties bestowed by an easement, plaintiff condo association qualified as a real party in interest to assert a claim that defendant neighboring homeowners association wrongfully installed a gate card facility on a lot owned by the condo association members in common. The condo association had standing to sue in its own name on behalf of its members where the condo owners were equally affected by the placement of the keypad on their commonly owned lot.

3. Damages and Remedies—punitive damages—summary judgment stage—basis

In an action to determine the rights and duties bestowed by an easement, the trial court erred by awarding punitive damages after granting summary judgment for plaintiff condo association, a stage not generally appropriate for this type of damages. Moreover, the trial court did not provide the underlying basis for awarding punitive damages.

4. Attorney Fees—statutory basis—supporting findings

In an action to determine the rights and duties bestowed by an easement, the trial court erred in awarding attorney fees to plaintiff condo association after granting summary judgment without

specifying the statutory basis for its award or making appropriate supporting findings of fact.

Appeal by Defendant from judgment entered 15 June 2017 by Judge James G. Bell in Brunswick County Superior Court. Heard in the Court of Appeals 8 August 2018.

Watts Law Group PLLC, by Susan A. Fine and S. Denise Watts, for the Plaintiff-Appellee.

McCoy Wiggins PLLC, by Richard M. Wiggins, for the Defendant-Appellant.

DILLON, Judge.

Defendant Ocean Isle West Homeowners Association, Inc. (the "Homeowners HOA"), appeals from the trial court's judgment granting Plaintiff Ocean Point Unit Owners Association, Inc. (the "Condo UOA"), summary judgment. After careful review, we affirm in part and vacate and remand in part.

I. Background

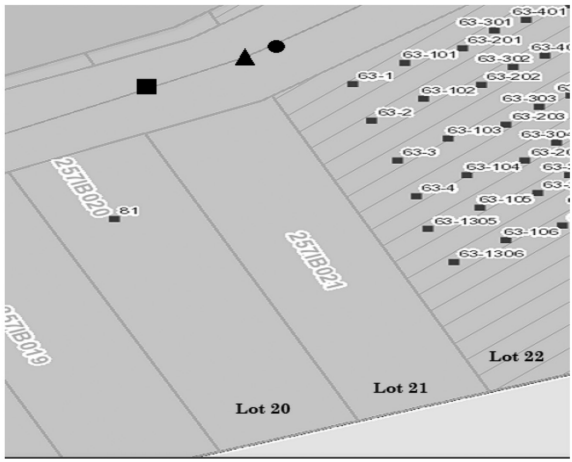
This matter involves a property dispute on the western end of Ocean Isle. Ocean Isle is a narrow island running west to east. At the western (left) end lies twenty (20) single-family lots which are part of the Homeowners HOA. These lots are numbered Lots 1-20 from west (left) to east (right). Lot 20 is the eastern-most (rightmost) lot in the Homeowners HOA. Just to the east (to the right) of Lot 20 is Lot 21, which is not part of the Homeowners HOA. Rather, Lot 21 is a vacant lot owned by the Condo UOA. To the east (to the right) of Lot 21 is Lot 22. Lot 22 is a larger lot where the condominium units served by the Condo UOA are located. Lot 22 is not owned by the Condo UOA itself, but rather it is owned *in common* by the condominium unit owners.

The northern boundaries of the aforementioned lots are the northern shore of Ocean Isle. There is one road, Ocean Isle West Boulevard, which provides ingress and egress to all the lots on the western end of Ocean Isle. This road runs across the northern portion of each lot.

In 1999, the then-owner of Lot 21, the vacant lot currently owned by the Condo UOA, granted the Homeowners HOA a non-exclusive easement (the "Easement") on the western portion of Lot 21 along the road for the purpose of the installation and maintenance of a card gate facility.

The Homeowners HOA desired to install the card gate facility to limit access to the western portion of Ocean Isle to only the Homeowners HOA residents and invited guests. The Homeowners HOA constructed its card gate facility on the road approximately twenty-five (25) feet from the western border of Lot 21. The owners of Lot 21 subsequently conveyed their interest in Lot 21 to the Condo UOA.

In June 2014, the Homeowners HOA moved its card gate facility about thirty (30) feet to the east along the road. The keypad itself, though, was actually placed by the Homeowners HOA even further east on the road portion of Lot 22, where the condominiums themselves are located.



1

■ Original card gate facility ▲ Second card gate facility ● Gate access keypad for second card gate facility

Three months later, in September 2014, the Condo UOA filed this action seeking (1) a declaratory judgment regarding the rights and duties bestowed by the Easement, (2) an order directing the Homeowners HOA to move its new card gate facility off of land that the Homeowners HOA had no right to use, and (3) damages for the use of property outside the Easement area without permission. During

1. Image adapted from Brunswick County GIS Data Viewer, found at: http://brunsco.maps.arcgis.com/apps/webappviewer/index.html?id=6df283e1aa634006baeedf6daac40d38&query=Parcels,PIN,107515634896.

the course of litigation, the Homeowners HOA failed to respond timely to discovery requests by the Condo UOA, and the trial court entered an order deeming each of the Condo UOA's Requests for Admission to be granted.

In June 2017, the trial court granted the Condo UOA's motion for summary judgment, ordering the Homeowners HOA to move the new card gate facility (gate and keypad) and to restrict the Homeowners HOA's use to the Easement area on the western side of Lot 21 and to repair any outstanding damage caused to Lots 21 and 22 by the installation and removal of the new card gate facility. The trial court also awarded punitive damages and attorney's fees to the Condo UOA.

The Homeowners HOA appeals.

II. Analysis

On appeal, the Homeowners HOA "abandons any issue in this appeal as to whether it had the right to move the card gate to a different location within the easement," essentially conceding that it did not have the right to do so under the terms of the Easement. Rather, the Homeowners HOA contends that the issues raised in the complaint and the respective governing statutes do not support the trial court's findings and conclusions regarding Lot 22, nor its awards of punitive damages and attorney's fees. We address each argument in turn.

A. Lot 22

[1] The Homeowners HOA challenges the portions of the trial court's order directing it to repair the damage caused by its placement of the new keypad onto *Lot 22*, the lot where the condominium units are situated. Specifically, the Homeowners HOA contends that the Condo UOA never mentioned Lot 22 in its complaint, nor did the Condo UOA show that it was a real party in interest regarding any claim pertaining to Lot 22. We disagree.

North Carolina follows the "notice theory" of pleading. "Under the notice theory of pleading, a statement of a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading." *Pyco Supply Co. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988). This simpler method of pleading is mindful of the "liberal opportunity for discovery and the other pretrial procedures" used in our trial process to narrow and refine the

issues, claims, and facts relative to an action. *Id.* at 442-43, 364 S.E.2d at 384.

Here, it is true that the Condo UOA never specifically alleged in its complaint that part of the new card gate facility, namely the new keypad, was actually constructed on Lot 22. But the Condo UOA clearly alleged in its complaint that the Homeowners HOA improperly moved the keypad eastward outside the Easement area without permission and that the Condo UOA wanted the keypad moved back to its original location, and that the Condo UOA wanted the Homeowners HOA to repair any damage caused to the property by the new card gate facility. Specifically, the Condo UOA alleged that the Homeowners HOA moved its card gate facility "approximately 30 (thirty) feet eastward . . . adjacent to the eastern property line of Lot 21[,]" which could be understood as the western property line of Lot 22. Also, the Condo UOA prayed the trial court to enter an order directing the Homeowners HOA to "repair any damage to the property caused by the installation and/or the removal of said gate." There is no ambiguity in the complaint as to the identity of the card gate facility which the Condo UOA alleges was wrongfully installed by the Homeowners HOA. Therefore, we conclude that the Condo UOA met the requirements of notice pleading with regard to the new keypad placed onto Lot 22.

[2] Further, we conclude that the Condo UOA qualified as the "real party in interest" to bring the claim regarding any damage to Lot 22 caused by the new card gate facility, notwithstanding that the Condo UOA only owns Lot 21 and that Lot 22 is technically owned in common by the condominium unit owners themselves.[2] Our Supreme Court has held that an association may sue in its own name on behalf of its members, so long as the association represents a joint interest "common to the entire membership, [or] shared by all in equal degree." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)).

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and

2. Our Condominium Act states that a development will not be considered a condominium under the Act "unless the undivided interests in the common elements are vested in the unit owners" themselves, and not in a separate association. N.C. Gen. Stat. § 47C-1-103(7) (2017).

> (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. (quoting *Hunt v. Washington State Apple Advert. Comm.*, 432 U.S. 333, 343 (1977)). It is undisputed here that the Condo UOA, which owns Lot 21, is the association for the condominium unit owners who own Lot 22. For instance, in the complaint, the Condo UOA alleged:

> 3. The members of the Plaintiff Association are the owners of units in Ocean Point, Phase 1, A Condominium, located in Ocean Isle Beach, Brunswick County, North Carolina, as condominium is shown and depicted on maps recorded in Condo Map 6, Pages 52-61 of the Brunswick County Registry, North Carolina, with the Declaration of Condominium being recorded in Book 734, at Page 548 of the Brunswick County Registry on the 10th day of June, 1988.

Defendant admitted this allegation in its answer. Additionally, a search of Condo Map 6, Pages 52-61, on the Brunswick County Registry reveals the property referred to is Lot 22. There is nothing in the record which shows that any particular condominium unit owner was damaged differently than the other unit owners by the placement of the keypad onto Lot 22. Therefore, we conclude that the placement of the keypad onto the common area of Lot 22 affected the condominium unit owners equally such that the Condo UOA had standing to pursue the claim on behalf of the unit owners.

B. Punitive Damages

[3] The Homeowners HOA argues that the trial court erred "in granting plaintiff's request for summary judgment" regarding the award of punitive damages. We agree.

In its order, the trial court awarded the Condo UOA $10,000 in punitive damages. However, the trial court did not cite to any findings or otherwise explain upon what basis it was making the award.

We conclude that the trial court erred for two reasons. First, most basically, it is generally not appropriate for the trial court at the summary judgment stage to award punitive damages. *See Cockerham-Ellerbee v. Town of Jonesville*, 190 N.C. App. 150, 157, 660 S.E.2d 178, 182 (2008) (holding that punitive damages were not appropriate at summary judgment because whether clear and convincing evidence of willful and

wanton conduct existed was a question for the jury.) Second, we cannot discern the basis for the award; the trial court did not indicate whether the award was based on a tort or other claim for which punitive damages might be available *or* on the claim for declaratory relief or other claim for which punitive damages are generally not recoverable. *See Id.* at 154-56, 660 S.E.2d at 181-82. It simply decreed that punitive damages were awarded. Therefore, we vacate the portion of the trial court's order awarding punitive damages to the Condo UOA and remand the issue for further proceedings consistent with this opinion.

C. Attorney's Fees

[4] Lastly, the Homeowners HOA challenges the trial court's award of attorney's fees. In North Carolina, attorney's fees are taxable as costs only when expressly authorized by statute. *See City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972).

Here, the trial court failed to state the statutory basis for its award or otherwise make appropriate findings to support its award of attorney's fees. *See*, *e.g.*, *Owensby v. Owensby*, 312 N.C. 473, 476, 322 S.E.2d 772, 774 (1984) (holding that, in awarding attorney's fees, the trial court must "make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the fees can be based"). Rather, the only mention of the attorney's fees at all is in the decretal paragraph containing the award itself. We, therefore, vacate the trial court's award of attorney's fees. On remand, the trial court may revisit the issue but must make adequate findings of fact and conclusions of law to support any award of attorney's fees.

III. Conclusion

We hold that the trial court did not err in ordering the Homeowners HOA to make all necessary repairs to Lot 22 resulting from movement of the card gate facility. The Condo UOA's pleadings adequately showed that it was a real party in interest with respect to Lot 22 and placed the Homeowners HOA on notice that it sought relief from all harm caused by movement of the card gate facility. And, on appeal, the Homeowners HOA expressly abandoned any issue as to whether it had the right to install the new card gate facility in the location where it made the installation.

We hold that the trial court did err in awarding punitive damages at the summary judgment stage. Therefore, we vacate the trial court's

award of punitive damages and remand the issue for further proceedings for a trial on this issue.

Finally, we hold that the trial court erred in awarding the Condo UOA attorney's fees. Specifically, the trial court failed to state the basis for the award or to make appropriate findings necessary to support its award of attorney's fees. We, therefore, vacate the trial court's award of attorney's fees and remand the matter for reconsideration by the trial court. On remand, the trial court may consider additional evidence and make any new findings of fact and conclusions of law.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Judges DAVIS and INMAN concur.

JOSEPH PADRON, PLAINTIFF
v.
BENTLEY MARINE GROUP, LLC, LARRY D. BREHM, KEENAN W. GREEN, AND NOEL WINTER, DEFENDANTS

No. COA18-537

Filed 4 December 2018

Jurisdiction—personal—minimum contacts—shareholder in defendant company—no other contacts with state

The requirements of due process did not permit the state of North Carolina to exercise personal jurisdiction over a former shareholder in a boat manufacturing company in a product liability action where defendant shareholder's only contact with North Carolina was his status as a former investor in the company, even if the company might be subject to personal jurisdiction in the state.

Appeal by defendant Keenan W. Green from order entered 20 March 2018 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 2018.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward and Matthew J. Millisor, for plaintiff-appellee.

Poyner Spruill LLP, by Karen H. Chapman and John M. Durnovich, for defendant-appellant Keenan W. Green.

ZACHARY, Judge.

Defendant Keenan W. Green appeals from the trial court's order denying his motion to dismiss plaintiff Joseph Padron's complaint against him for lack of personal jurisdiction. Defendants Bentley Marine Group, LLC, Larry D. Brehm, and Noel Winter are not parties to the instant appeal. We conclude that North Carolina lacks personal jurisdiction over Green in the instant case, and accordingly reverse and remand for entry of an order granting Green's motion to dismiss.

Background

Plaintiff filed a complaint on 3 July 2017 against defendants Bentley Marine Group, Brehm, Winter, and Green for damages resulting from a 4 July 2014 boating accident that took place in North Carolina wherein "Plaintiff's left hand was severely injured and disfigured while using a Bentley Industries 2006 Model 240 Cruise pontoon boat." According to the complaint, the Boat was manufactured by Bentley Industries, LLC, "a defunct limited liability company previously organized under the laws of South Carolina." The complaint alleges that the Boat "was a dangerous and defective product at the time it was manufactured and designed, in that it failed to take account for an inherently deadly flaw in its design—a so-called 'pinch point' that led to the loss of Plaintiff's finger." The complaint further alleges that "Bentley Industries, LLC failed to provide any adequate warning, instruction, or recall related to the dangerous and defective manufacture and design of the Boat, although it knew or should have known of that dangerous and defective condition and had the opportunity to provide timely and effective warning."

The complaint alleges that sometime in 2008, about two years after Bentley Industries manufactured the Boat, "there was some sort of transaction involving Bentley Industries, LLC and Defendants [Bentley Marine Group, Brehm, Green, and/or Winter], in which one or more of said Defendants purchased Bentley Industries, LLC, including both its assets and liabilities." The complaint alleges that defendants, "by virtue of purchasing Bentley Industries, LLC, at a time when the dangerous and defective nature of the Boat and other similar boats was or should have been evident, . . . are legally liable for all claims based upon the negligent and defective manufacture and design of the Boat," and further, that prior to the date that plaintiff was injured, defendants were "aware of the negligent and defective manufacture and design of the Boat . . . , yet none of the Defendants . . . issued any warning, let alone any proper, adequate, or effective warning, regarding the dangerous and defective

nature of the Boat, despite having the opportunity and responsibility to do so."

The complaint seeks to hold Green and his fellow defendants jointly and severally liable for plaintiff's injuries. The complaint further alleges that Green "served as the alter ego of Defendant Bentley Marine Group," and therefore seeks to "pierce the corporate veil of Defendant Bentley Marine Group, LLC to reach the personal assets" of Green.

None of the defendants are residents of North Carolina. The complaint alleges that Green is a resident of South Carolina and that Bentley Marine Group "is or was a limited liability company organized under the laws of South Carolina." Plaintiff's complaint nevertheless alleges that Green "is subject to personal jurisdiction in the State of North Carolina pursuant to N.C. Gen. Stat. 1-75.4(4) (Local Injury; Foreign Act)." Plaintiff makes similar allegations as to the other defendants.

Green filed a motion to dismiss plaintiff's complaint against him for lack of personal jurisdiction, among other grounds. Green attached to his motion to dismiss an affidavit in which he provided, *inter alia*, that:

> 2. I am a citizen and resident of Charleston, South Carolina where I have resided almost all of my life.
>
> 3. I received a copy of the Complaint at my office in Summerville, South Carolina.
>
> 4. I have never been a resident of the State of North Carolina.
>
> 5. I have no ownership interest in any company located or doing business in North Carolina.
>
> 6. I do not have any family members that reside in North Carolina.
>
> 7. I have never personally derived revenue directly from goods used or consumed or services rendered in North Carolina.
>
> 8. I have never owned, used or possessed rights to any real or personal property located in North Carolina, nor do I maintain any banking or other financial accounts in North Carolina.
>
> 9. I am not licensed or registered to do business in North Carolina.

> 10. I have never had a personal office or address of any kind in North Carolina.
>
> 11. Prior to the filing of this matter, I have never been sued or made a general appearance in North Carolina.
>
> 12. I do not have a registered agent for service of process in North Carolina.

With regard to his involvement with Bentley Marine Group, Green's affidavit further provided that "I have never commingled my funds or assets with those of Bentley Marine Group, LLC" and that "I have never personally co-owned any financial accounts or assets owned or controlled by Bentley Marine Group, LLC." Finally, Green maintained that "[w]ith respect to allegations [in the complaint], I was not involved in the day-to-day activities or management of Bentley Marine Group, LLC. The extent of my involvement with Bentley Marine Group, LLC was as a silent member for a very brief period of time in 2008."

Plaintiff responded by submitting an affidavit in which he stated that:

> 1) As this lawsuit reveals, I was injured badly while using [the] [B]oat in North Carolina.
>
> 2) My research of this type of "Bentley" boat shows that it was a brand that was sold all over the United States, including in North Carolina.
>
> 3) I have confirmed that to this day, boats of the type in question are available for sale in North Carolina.
>
> 4) My personal research also shows that injuries of the type that happened to me had happened to other people before it happened to me.
>
> 5) When I got on [the] [B]oat in North Carolina, I did not expect to suffer a terrible injury there that would force me to have to sue the boat owners. Unfortunately, that is what happened, and I want my day in court against whoever is determined to be legally responsible.

Green's motion to dismiss was heard before the Honorable Hugh B. Lewis at the 28 February 2018 session of the Mecklenburg County Superior Court. The trial court denied Green's motion to dismiss by order entered 20 March 2018. The trial court's order does not contain findings of fact. Defendant Green timely appealed.

On appeal, Green argues that it was error for the trial court to deny his motion to dismiss in that the record does not reveal the requisite level of contacts with North Carolina needed in order for North Carolina to exercise personal jurisdiction over him. We agree.

Grounds for Appellate Review

Despite the trial court's order being interlocutory, Green nevertheless has a right of immediate appeal from the denial of his motion to dismiss in that it constitutes "an adverse ruling as to the jurisdiction of the court over the person." *Strategic Outsourcing, Inc. v. Stacks*, 176 N.C. App. 247, 249, 625 S.E.2d 800, 802 (2006) (quoting N.C. Gen. Stat. § 1-277(b)).

Standard of Review

It is settled that "[t]he determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140, 515 S.E.2d 46, 48 (1999). "[U]pon a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of making out a *prima facie* case that jurisdiction exists." *Bauer v. Douglas Aquatics, Inc.*, 207 N.C. App. 65, 68, 698 S.E.2d 757, 761 (2010). If the defendant "supplements [his] motion with affidavits or other supporting evidence, the allegations of the plaintiff's complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint[.]" *Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 163, 565 S.E.2d 705, 708 (2002) (citation and quotation marks omitted). Instead, the plaintiff "must respond by affidavit or otherwise setting forth specific facts showing that the court has jurisdiction." *Id.* (citation and quotation marks omitted).

In the instant case, the trial court's order does not contain findings of fact, nor did either party request the same. "In such a situation it is presumed that the trial court found facts sufficient to support [its] order," *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 306, 655 S.E.2d 446, 449 (2008), "and our role on appeal is to review the record for competent evidence to support these presumed findings." *Stetser v. TAP Pharm. Prods.*, 162 N.C. App. 518, 520, 591 S.E.2d 572, 574 (2004); *see also* N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2017).

Discussion

The analysis of "whether a non-resident defendant is subject to personal jurisdiction of North Carolina's courts" is two-pronged. *Robbins*

v. Ingham, 179 N.C. App. 764, 768, 635 S.E.2d 610, 614 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 221, 642 S.E.2d 448 (2007). "First, there must be a basis for jurisdiction under the North Carolina long-arm statute, and second, jurisdiction over the defendant must comport with the constitutional standards of due process." *Id.*; N.C. Gen. Stat. § 1-75.4 (2017). Nevertheless, "our long-arm statute was intended to make available to North Carolina courts the full jurisdictional powers permissible under due process." *Robbins*, 179 N.C. App. at 770, 635 S.E.2d at 615 (citing *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977)). Accordingly, because the "statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert *in personam* jurisdiction over a defendant is whether the assertion comports with due process." *J.M. Thompson Co. v. Doral Mfg. Co.*, 72 N.C. App. 419, 424, 324 S.E.2d 909, 913 (1985).

As our Supreme Court has stated, in order for the exercise of personal jurisdiction over a non-resident defendant to comply with due process, "there must exist certain minimum contacts between the nonresident defendant and the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Tom Togs, Inc., v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986). The minimum contacts test requires "some act by which the defendant purposefully avail[ed] himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* "Whether minimum contacts are present is determined by ascertaining what is fair and reasonable under the circumstances, not by using a mechanical formula." *Robbins*, 179 N.C. App. at 770, 635 S.E.2d at 615.

In light of these standards, although the order does not contain findings of fact, we may nevertheless presume that the trial court found that North Carolina could appropriately exercise personal jurisdiction over Green (1) because the provisions of North Carolina's long-arm statute had been satisfied, and (2) because Green had the requisite minimum contacts with North Carolina to satisfy the demands of due process. Green's primary contention on appeal pertains to the latter finding: that "endorsing the exercise of personal jurisdiction" based on the record in this case "would eviscerate fundamental due-process protections." That is, as an out-of-state resident, Green maintains that he cannot "be hauled into court in North Carolina for a product-liability lawsuit against an out-of-state company simply because of his brief, passive investment in that company more than a decade ago."

In response, plaintiff first argues that Bentley Marine Group's involvement in the stream of commerce in North Carolina, through its sale of boats in this State, is sufficient to confer personal jurisdiction not only over Bentley Marine Group, but also Green. Plaintiff's argument on this point is misplaced.

To be sure, there will exist sufficient minimum contacts to permit a forum state to exercise personal jurisdiction over a corporation where that corporation has " 'deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.' " *Tart v. Prescott's Pharm., Inc.*, 118 N.C. App. 516, 521-22, 456 S.E.2d 121, 126 (1995) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 62 L. Ed. 2d 490, 502 (1980)). However, the fact that a court may properly exercise personal jurisdiction over a corporation under a "stream of commerce" analysis does not establish that a court may properly exercise personal jurisdiction over the corporation's individual shareholders. *Id.* Instead, the minimum contacts analysis must "focus[] on the actions of the non-resident defendant over whom jurisdiction is asserted, and not on the unilateral actions of some other entity." *Centura Bank v. Pee Dee Express, Inc.*, 119 N.C. App. 210, 213, 458 S.E.2d 15, 18 (1995).

If an individual shareholder "conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him." *United Buying Grp., Inc. v. Coleman*, 296 N.C. 510, 515, 251 S.E.2d 610, 614 (1979). Absent sufficient individual contacts with the forum state, however, "personal jurisdiction over an individual officer or employee of a corporation may not be predicated merely upon the corporate contacts with the forum." *Robbins*, 179 N.C. App. at 771, 635 S.E.2d at 615. Nor may the requisite level of minimum contacts sufficient to confer personal jurisdiction be established based solely upon an individual's status as a shareholder. *See Saft Am., Inc. v. Plainview Batteries, Inc.*, 189 N.C. App. 579, 595, 659 S.E.2d 39, 50 (2008) (Arrowood, J., dissenting), *rev'd for the reasons stated in the dissent*, 363 N.C. 5, 673 S.E.2d 864 (2009); *see also J.M. Thompson Co.*, 72 N.C. App. at 427, 324 S.E.2d at 915 ("If, by merely acquiring . . . an economic interest in a foreign corporation, a person became responsible for every obligation incurred by that corporation, and subject to suit in whatever state the corporation happened to be located or incorporated, a negative impact on corporate investing and mergers would result. We find no justification in logic or law for discouraging investments in this fashion.").

Here, it is well established that Green's investment in Bentley Marine Group does not, on its own, constitute "some act by which" Green purposefully availed himself "of the privilege of conducting activities within [North Carolina], thus invoking the benefits and protections of [our] laws." *Carswell Distrib. Co. v. U.S.A.'s Wild Thing*, 122 N.C. App. 105, 107, 468 S.E.2d 566, 568 (1996). And while Bentley Marine Group would indeed be subject to personal jurisdiction under a stream of commerce analysis, the record is otherwise devoid of any act by Green that would subject him to the same.

For instance, the record does not suggest that after investing in Bentley Marine Group, Green personally participated in the marketing, sale, design, manufacture, or recall of its boats. Nor does plaintiff's affidavit contradict Green's assertions that he was "not involved in the day-to-day activities or management of Bentley Marine Group," or that his involvement was limited to that of "a silent member for a very brief period of time in 2008." *E.g.*, *Rauch v. Urgent Care Pharm.*, 178 N.C. App. 510, 518, 632 S.E.2d 211, 217-18 (2006). Instead, the record reveals that Green has never been a North Carolina resident, nor has he ever owned real or personal property in North Carolina. *E.g.*, *id.* Quite plainly, plaintiff has proffered no evidence to suggest that Green's contacts with North Carolina consist of anything beyond mere investments in a company that manufactures boats which were or can be purchased here. *E.g.*, *Robbins*, 179 N.C. App. at 771, 635 S.E.2d at 615.

Nevertheless, plaintiff also argues that because Green "served as the alter-ego" of Bentley Marine Group, and because North Carolina has personal jurisdiction over Bentley Marine Group, Green is likewise subject to personal jurisdiction in North Carolina under a veil-piercing analysis. Plaintiff's arguments on this point are also misplaced.

"Piercing the corporate veil . . . allows a plaintiff to impose legal liability for a corporation's obligations, or for torts committed by the corporation, upon some other . . . individual that controls and dominates a corporation" to such an extent that the corporation exists as "a mere instrumentality or alter ego" of that individual. *Green v. Freeman*, 367 N.C. 136, 145, 749 S.E.2d 262, 270 (2013) (emphasis omitted). "The doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form." *Id.* at 146, 749 S.E.2d at 271.

Plaintiff relies on veil piercing to assert personal jurisdiction over Green on the theory that "if the corporate form of a liable entity is

disregarded, and an individual defendant is identified as the alter ego thereof, []he will be held liable for claims against the corporation." This assertion is indeed true. However, it does not necessarily follow that the individual defendant could be held liable *in a North Carolina court*. Plaintiff confuses veil piercing with personal jurisdiction. *Cf. Ridgeway Brands Mfg., LLC*, 188 N.C. App. at 306, 655 S.E.2d at 449 ("[P]laintiff cites no authority for its proposition that if an out-of-state corporation is the alter ego of a North Carolina corporation, then the courts of North Carolina have personal jurisdiction over the out-of-state corporation.").

By way of contrast, in *Tart v. Prescott's Pharmacies*—one of the primary cases upon which plaintiff relies—personal jurisdiction was properly exercised over the individual defendants because they had specifically orchestrated the advertising and sale in North Carolina of their principal corporation's weight-loss drugs that injured the plaintiff. 118 N.C. App. at 522, 456 S.E.2d at 126. In fact, the individual defendants were the "principal officers and directors" of the corporation and had been federally charged, in their individual capacities, for their fraudulent representations concerning the weight-loss drugs. *Id.* at 521, 518, 456 S.E.2d at 125, 123. It was these specific contacts that conferred personal jurisdiction upon the defendants, not the status of the individual defendants as "alter egos" of the corporation.

In any event, in the instant case, plaintiff's complaint contains but one allegation to support Green's status as an alter ego:

> 21. Upon information and belief, . . . [Defendant Green] served as the alter ego of Defendant Bentley Marine Group[.]

The record is devoid of any pertinent facts tending to establish Green's control over Bentley Marine Group beyond this single conclusory allegation. In response to Green's motion to dismiss and accompanying affidavit, the only additional evidence that plaintiff introduced was his own affidavit, which makes no mention of Green whatsoever. Accordingly, we conclude that the pleadings and affidavits fall short of constituting competent evidence that Green operated as the alter ego of Bentley Marine Group for purposes of establishing personal jurisdiction. *See Ridgeway Brands Mfg., LLC*, 188 N.C. App. at 306, 655 S.E.2d at 449 ("We hold that plaintiff's conclusory allegation in the Second Amended Complaint is insufficient to establish that Trevally is the alter ego of Ridgeway for purposes of determining whether the courts of North Carolina have jurisdiction over Trevally."). Thus, the trial court's order cannot be sustained on this ground.

Conclusion

In sum, because the record reveals that Green's only contact with North Carolina was Green's status as an investor in a corporation that may be subject to personal jurisdiction in North Carolina, the evidence is insufficient to establish the level of minimum contacts that due process demands for the proper exercise of personal jurisdiction over an individual. Accordingly, the trial court's order denying Green's motion to dismiss for lack of personal jurisdiction must be reversed as a matter of law.

REVERSED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
JIMMY LEE FARMER

No. COA18-65

Filed 4 December 2018

Constitutional Law—right to speedy trial—Barker factors—63-month delay—late assertion of right

A defendant whose criminal trial was delayed nearly 63 months after his arrest failed to demonstrate a violation of his right to a speedy trial where the delay was caused by a backlog of pending cases in the county and a shortage of assistant district attorneys, defendant continued to petition the court for resources to develop his case for at least 2 years following his arrest, defendant failed to assert his right until almost 5 years after his arrest, and defendant's ability to defend his case was not impaired.

Judge ARROWOOD dissenting.

Appeal by defendant from judgment entered 20 July 2017 by Judge Lori I. Hamilton in Rowan County Superior Court. Heard in the Court of Appeals 4 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Anna Szamosi, for the State.

Edgerton Law Office, by Jarvis John Edgerton, IV, for defendant-appellant.

BRYANT, Judge.

Where defendant has not demonstrated that his constitutional right to a speedy trial has been violated, we affirm the trial court's ruling.

On 7 May 2012, defendant Jimmy Lee Farmer was indicted in Rowan County Superior Court for first-degree sex offense with a child and indecent liberties with a child. The facts giving rise to the indictment showed that on 8 March 2012, four-year-old Savannah[1] was molested by defendant while visiting her grandmother's home. Savannah's grandmother was married to defendant. One afternoon, while visiting her grandmother's house, Savannah was outside with her family and asked to go inside for a snack. Defendant carried Savannah into the home and eventually into the bedroom where he removed Savannah's clothing and touched her genitals. Savannah's grandmother went inside and did not see them in the kitchen. She went to the bedroom where she saw Savannah lying on the bed. When Savannah got off the bed, she pulled her underwear up, and defendant rushed out of the room without making eye contact. Savannah initially told her grandmother she was jumping on the bed. However, she later told her mother defendant touched her. Savannah's mother called the Rowan County Sheriff's Department to investigate, and defendant was later arrested. Additional relevant facts later brought out at trial revealed that defendant had sexually molested Savannah's cousin when she was between the ages of five and nine years old.

Defendant waived arraignment on 24 May 2012 and 5 November 2012. On 15 July 2013, defendant filed a motion requesting a bond hearing to reduce his bond; however, defendant's motion was not calendared. Defendant's trial was scheduled for 30 January 2017 until defendant's defense counsel and Paxton Butler, the Assistant District Attorney (ADA) for Rowan County (hereinafter ADA), agreed to continue the case and calendar it for the 17 July 2017 trial session. Nearly five years after the indictment and a few weeks after his case was first scheduled for trial, defendant filed a motion for a speedy trial on 6 March 2017 and requested that the trial court either dismiss the case or establish a peremptory date for trial. On 11 July 2017, defendant filed a motion to dismiss alleging a violation of the right to a speedy trial found in the

1. A pseudonym is used to protect the identity of the minor child and for ease of reading.

North Carolina Constitution and the United States Constitution. Per the motion, defendant had "the same counsel throughout the life of the case."

The matter came before the Honorable Lori I. Hamilton, Judge presiding, who heard the motion on 17 July 2017 just prior to trial. Defendant called Amelia Linn, Rowan County Assistant Clerk of Court, to testify regarding the motion to dismiss based on a speedy trial violation. Linn testified that her office was the keeper of records and she was the supervisor of the criminal division records. Linn also testified that at least 65 trial sessions had occurred during the time between defendant's indictment and his trial. Additionally, the court records showed defendant's case was calendared for the 9 May 2012 session and then rescheduled for the 30 January 2017 session. Between those two sessions, there was no trial activity in defendant's case and no subpoenas were issued.[2] These records were admitted into evidence without objection by the ADA.

After reviewing the evidence and representations made by both parties, the trial court applied the factors in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 101 (1972) (hereinafter the *Barker* factors) and determined that defendant's right to a speedy trial was not violated. Subsequently, defendant's motion to dismiss was denied and the State proceeded to trial. Defendant did not call any witnesses.

On 20 July 2017, defendant was found guilty of both charges. Judge Hamilton entered consecutive sentences of 338 months to 476 months with credit given for time served while awaiting trial. Defendant immediately gave notice of appeal.

On appeal, defendant argues the trial court erred by denying his motion to dismiss because the State violated his constitutional right to a speedy trial. Specifically, defendant argues that the State's failure to calendar his trial date in a timely manner was unreasonable as he waited approximately five years before his jury trial. While this was a

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2. We note there was pre-trial activity in defendant's case. On 29 July 2013, in response to defendant's motion, the court granted an order allowing funds for a private investigator. On 21 January 2014, defendant filed a motion for funds for an expert analyst, which was granted by the trial court on 22 January 2014. The State filed for a protective order on 10 December 2013 precluding copies of the DVD and pictures of the victim from being reproduced. Additionally, on 23 January and 12 July 2017, defendant filed two motions in limine–to exclude evidence of defendant's 1983 murder conviction of his wife and daughter, and to exclude evidence of prior bad acts–which the trial court granted on 18 July 2017.

significantly long time to await trial, we disagree that the five-year delay constituted a speedy trial violation based on the facts of this case.

"The denial of a motion to dismiss on speedy trial grounds presents a question of constitutional law subject to *de novo* review." *State v. Johnson*, ___ N.C. App. ___, ___, 795 S.E.2d 126, 131 (2016). "We therefore consider the matter anew and substitute our judgment for that of the trial court." *Id.*

> The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not per se prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citing *Barker*, 407 U.S. at 514, 33 L.Ed.2d at 101).

"In determining whether a defendant has been deprived of his right to a speedy trial, [pursuant to] N.C. Const. art I, § 18; U.S Const. amend VI, our courts consider four interrelated factors together with such other circumstances as may be relevant." *State v. Chaplin*, 122 N.C. App. 659, 662, 471 S.E.2d 653, 655 (1996) (quotations omitted). These *Barker* factors include: "(1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant resulting from the delay." *Id.* (quoting *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989)). "None of these [*Barker*] factors are determinative; they must all be weighed and considered together[.]" *State v. Wilkerson*, ___ N.C. App. ___, ___, 810 S.E.2d 389, 392 (2018).

Length of Delay

In the instant case, defendant was arrested and remained incarcerated for nearly 63 months—approximately five years, two months and twenty-four days—before his case was tried. While "the length of the delay is not *per se* determinative of whether defendant has been deprived of his right to a speedy trial[,]" the "post[-]accusation delay [is] presumptively prejudicial at least as it approaches one year." *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003) (quotations omitted). Here, the

length of the delay is significant enough to trigger an inquiry into the remaining *Barker* factors.

Reason for the Delay

> Second, defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution[,] must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence.

Id. (citation omitted).

Defendant argues there was administrative neglect by the State to calendar his trial and motions. Specifically, defendant contends that the State allowed his case to be idle while there were 77 administrative sessions and 78 trial sessions between 2012 and 2017. The State acknowledged that there was a considerable delay in calendaring defendant's case. However, the State presented evidence of crowded dockets and earlier pending cases given priority as a valid justification for the delay.

According to the record, it is undisputed that the primary cause for defendant's delayed trial was due to a backlog of pending cases in Rowan County and a shortage of staff of assistant district attorneys to try cases. The State asserts that, at minimum, defendant also played a role in the delay as the record shows defendant was still preparing his trial defense as of late 2014 when he requested funds to obtain expert witnesses. Significantly, defendant filed his motion for a speedy trial after he agreed to continue his case to the next trial session in 2017. Thus, defendant himself acquiesced in the delay by waiting almost five years after indictment to assert a right to speedy trial.

Although case backlogs are not encouraged, we agree with the trial court's conclusion that defendant did not establish a prima facie case that the delay was caused by neglect or willfulness of the prosecution. The record supports that neither party assertively pushed for this case to be calendared before 2017, and after defendant agreed to continue his case, scheduling conflicts prevented defendant's case from being calendared before 20 July 2017.

Assertion of Right

"A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who

does not." *State v. Strickland*, 153 N.C. App. 581, 587, 570 S.E.2d 898, 903 (2002). A "[d]efendant is not required to demand that the state prosecute him" as it is the State's duty to assure that a defendant's case is brought to trial in a timely fashion. *State v. Pippin*, 72 N.C. App. 387, 395, 324 S.E.2d 900, 906 (1985). "But a defendant's failure to assert his speedy trial right, or his failure to assert the right sooner in the process [weighs] against his contention that he has been denied his constitutional right to a speedy trial. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 133.

Here, defendant formally asserted his right to a speedy trial on 6 March 2017, almost five years after he was arrested. The trial court acknowledges in its findings that at least two years following defendant's arrest, defendant was still petitioning the court for resources to develop his case. In 2013 and 2014, defendant filed motions for expert funding to aid in his defense, both of which were granted. Although defendant contends he did not have the authority to calendar his case sooner, defendant did not take affirmative steps to bring his case to the court's attention until 2017. Within four months of his assertion of a speedy trial right, defendant's case was calendared and tried. Given the short period between defendant's demand and his trial, defendant's failure to assert his right sooner weighs against him in balancing this *Barker* factor.

Prejudice

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118. In considering this factor, "[a] defendant must show actual, substantial prejudice." *Spivey*, 357 N.C. at 122, 579 S.E.2d at 257.

> The constitutional right to a speedy trial addresses three concerns: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these concerns, most important is whether the prosecutor's delay hampered defendant's ability to present his defense.

Johnson, ___ N.C. App. at ___, 795 S.E.2d at 133 (citation and quotations omitted).

Here, defendant contends he was prejudiced as the length of the delay could have potentially affected the witnesses' ability to accurately recall details, and therefore, possibly impaired his defense. *See Barker*, 407 U.S. at 532–33, 33 L. Ed. 2d at 118 ("Loss of memory . . . is not always

reflected in the record because what has been forgotten can rarely be shown. . . . [I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."). However, the victim, who was nine at the time she testified, was able to recall details of the incident itself although she demonstrated some trouble remembering details before and after the incident which occurred when she was three years old. Other witnesses, however, testified and outlined the events from that day. Also, as the trial court pointed out, defendant has had access to all the witnesses' interviews and statements to review for his case and/or use for impeachment purposes. Considering that the information was available to defendant, we do not believe defendant's ability to defend his case was impaired.

Although defendant has not provided evidence or sufficiently argued pretrial incarceration detrimentally impacted his life, we recognize the disadvantages defendant could experience by the "restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility" while in confinement. *Id.* at 533, 33 L. Ed. 2d at 118. However, as we have previously discussed, defendant's lack of assertiveness in bringing his case to the court's attention before 2017 contradicts his argument of anxiety or concern about the status of his case. To some extent we are inclined to believe "he had hoped to take advantage of the delay in which he had acquiesced." *Id.* at 535, 33 L. Ed. 2d at 119. Thus, after carefully balancing the delay with potential prejudice, we remain unpersuaded by defendant's argument that he suffered prejudice as a result of the delay.

Conclusion

Having considered the Barker factors and other relevant circumstances, we conclude that defendant has failed to demonstrate that his constitutional right to a speedy trial was violated. Accordingly, we affirm the trial court's denial of defendant's motion to dismiss.[3]

AFFIRMED.

Judge HUNTER, JR., concurs.

Judge ARROWOOD dissents in separate opinion.

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3. We urge the trial court–and prosecutors in particular–to carefully attend to the backlog of cases. The deprivation of a speedy trial is not taken lightly; especially those where, like here, pre-trial incarceration extends for over five years. This is a significant delay that *potentially* infringes on constitutional rights. Unlike the facts and circumstances in this case which did not show a clear constitutional violation, a slight shift in relevant facts could have easily indicated unfair prejudice to a defendant so as to require dismissal.

ARROWOOD, Judge, dissenting.

I dissent. The majority spends a great deal of time detailing defendant's previous record and the despicable nature of the crime with which defendant was charged. As I understand the requirements of Article I, Section 18 of the North Carolina Constitution and the Sixth Amendment to the United States Constitution, the right to a speedy trial does not turn on whether defendant is an upstanding citizen. I also do not see where a defendant's prior record or the heinous nature of the crime is among the factors to be applied under the cases such as *Barker v. Wingo* 407 U.S. 514, 33 L. Ed. 2d 101 (1972), which have interpreted the considerations relevant to whether the State has violated this right. *See id.* at 530-33, 33 L. Ed. 2d at 115-19. Analyzing the factors to be applied, none of which support the State's position, I would find defendant demonstrated that his constitutional right to a speedy trial was violated.

Our Court considers "[t]he denial of a motion to dismiss on speedy trial grounds . . . *de novo*[.]" *State v. Johnson*, __ N.C. App. __, __, 795 S.E.2d 126, 131 (2016) (citation omitted).

To determine "whether a defendant has been deprived of his right to a speedy trial, N.C. Const. art I, § 18; U.S[.] Const. amend VI, our courts consider four interrelated factors together with such other circumstances as may be relevant." *State v. Chaplin*, 122 N.C. App. 659, 662, 471 S.E.2d 653, 655 (1996) (citation and internal quotation marks omitted). These factors are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the resulting prejudice to the defendant. *State v. Groves*, 324 N.C. 360, 365, 378 S.E.2d 763, 767 (1989) (citing *Barker*, 407 U.S. at 530-32, 33 L. Ed. 2d at 117-18) (citation omitted). "No single factor is regarded as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978).

> Instead the factors and other circumstances are to be balanced by the court with an awareness that it is dealing with a fundamental right of the accused which is specifically affirmed in the Constitution. The burden is, nonetheless, on the defendant to show that his constitutional rights have been violated and a defendant who has caused or acquiesced in the delay will not be allowed to use it as a vehicle in which to escape justice.

Chaplin, 122 N.C. App. at 662-63, 471 S.E.2d at 655 (citations and internal quotation marks omitted).

I. Length of Delay

I agree with the majority that the delay in this case, five years, two months and twenty-four days, is presumptively prejudicial. *See State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003). Therefore, the length of the delay triggers an inquiry into the remaining *Barker* factors. In addition, this is not an isolated incident in this judicial district. This is the second case this Court has considered from this district within the last year where there has been a delay of over five years in bringing a case to trial. Such delays not only affect defendants, but also the victims, who are held in limbo and unable to put the offenses in the past and attempt to heal and move on with their lives without the potential of having to relive the incidents through testimony many years in the future.

II. Reason for the Delay

"[D]efendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution." *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000) (citation omitted), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). Once a defendant "makes a *prima facie* showing that the delay resulted from neglect or willfulness by the State, the burden shifts to the State to provide a neutral explanation for the delay." *Johnson*, __ N.C. App. at __, 795 S.E.2d at 131 (citation and internal quotation marks omitted).

Here, defendant alleges administrative neglect by the State. Unlike the majority, I would hold defendant established a *prima facie* case that the delay was due to the prosecution's neglect, as "[a] showing of a particularly lengthy delay establishes a *prima facie* case that the delay was due to the neglect or wilfulness of the prosecution[.]" *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 655-56 (citations and internal quotation marks omitted). Therefore, the State must offer evidence fully explaining the reasons for the delay that are sufficient to rebut defendant's *prima facie* showing.

To rebut defendant's case, the State maintains: (1) defendant acquiesced to the delay, and (2) Rowan County's dockets were overcrowded.

First, I disagree that defendant acquiesced to the delay. Admittedly, defendant moved for expert funding in 2013 and 2014, agreed to the State's request to continue the case from the January 2017 calendar to the next trial session, and waited over four years to file the instant motion. However, these facts are insufficient to show that defendant consented to the entirety of the five year, two month and twenty-four day delay in bringing the case to trial.

Defendant's efforts to refine his case in 2013 and 2014 while awaiting trial do not demonstrate an agreement to delay trial, and defendant's agreement to the State's request to continue the trial from January 2017 to the next trial term only shows acquiescence to the passage of 1 of the 78 trial sessions held while defendant was incarcerated.[1] Additionally, although the trial court's finding that defendant waited over four years to file the motion at issue weighs against defendant's argument that he was deprived of his right to a speedy trial, the last minute nature of the motion does not show defendant assented to the State's delay of his trial.

Second, while I agree that congested dockets can constitute a valid basis for delay, responsibility for such delay nonetheless belongs to the State and ultimately weighs against the State. *Johnson*, __ N.C. App. at __, 795 S.E.2d at 132. Additionally, the reason for delay is closely associated with the length of delay. *State v. Pippin*, 72 N.C. App. 387, 392-93, 324 S.E.2d 900, 904-905 (1985). In light of these considerations, and the lack of additional basis for the delay, I would hold that the extensive delay before us is outside of constitutional bounds. This result is supported by our Court's recent unpublished opinion, *State v. Smith*, __ N.C. App. __, 814 S.E.2d 485, 2018 WL 2648289 (N.C. Ct. App. June 5, 2018) (unpublished), which both the State and defendant discuss on appeal.

In *Smith*, our Court considered another case delayed by the crowded docket in Rowan County Superior Court, in which over five and a half years passed between the defendant's arrest in April 2011 and his trial in November 2016. *Smith*, __ N.C. App. at __, 814 S.E.2d at __, 2018 WL 2648289 at *3. Without deciding whether defendant met his *prima facie* burden, our Court held that, regardless, there was "sufficient evidence . . . to support the trial court's conclusions that the State's reasons for delay were 'reasonable and valid justifications for delay in this case[.]' " *Id.* at __, 814 S.E.2d at __, 2018 WL 2648289 at *4. These reasons were: the overcrowding of the Rowan County Superior Court docket, the victim recanted, creating the need for additional law enforcement investigation, defendant's counsel was permitted to withdraw from representation when he was elected as a district court judge, defendant's attorneys never filed a motion or request to calendar defendant's case for trial, and the State never refused a request to calendar the case for trial. *Id.* "Additionally, weighing against defendant, the court made findings that

1. Although the trial court found that "it appears that both parties acted in good faith with one another in scheduling the matters for trial as soon as practicable" after 30 January 2017, this finding, without more, does not suffice to show defendant acquiesced in the delay of his trial until July 2017, particularly given that he filed the motion for speedy trial in March 2017.

defendant's counsel discussed . . . filing a speedy trial motion with defendant early on in the case but they agreed not to push for a trial because time might work to their benefit." *Id.* Thus, although there was a lengthy period of incarceration prior to trial, we held that the "delays attributable to the defense outweigh the crowded docket and" weigh the reason for delay against defendant. *Id.* at __, 814 S.E.2d at __, 2018 WL 2648289 at *5. Here, as discussed, the trial court did not find significant delays attributable to the defense as in *Smith*. In particular, there is no evidence that defendant was using the delay as trial tactic hoping the delay would aid in getting the victim to recant the allegations as was shown in *Smith*.

In addition, while the reason for the delay may be an overcrowded docket and not due to willfulness related to the staff of the District Attorney's office, the State has the responsibility to adequately fund the criminal justice system with sufficient prosecutors and other court personnel to timely dispose of cases. In my view it is totally unacceptable to have judicial districts where both crime victims and those accused of the crimes are waiting over five years for those charges to be resolved because there are not enough resources to try the cases sooner.

Our State has an obligation to adequately fund the judicial system to meet constitutional requirements. This obligation is demonstrated by the State's obligation to provide counsel for indigent defendants pursuant to *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963). *See State v. Morris*, 275 N.C. 50, 56-57, 165 S.E.2d 245, 249 (1969); *see also Boyer v. Louisiana*, 569 U.S. 238, 246, 185 L. Ed. 2d 774, 779 (2013) (Sotomayor, J., dissenting from dismissal of *writ of certiorari*) (applying the logic of *Vermont v. Brillon*, 556 U.S. 81, 173 L. Ed. 2d 231 (2009), in which the Supreme Court noted that, in evaluating speedy trial claims, "[d]elay resulting from a systemic breakdown in the public defender system could be charged to the State[,]" *id.* at 94, L. Ed. 2d at 242, Justice Sotomayor opined that "[w]here a State has failed to provide funding for the defense and that lack of funding causes a delay, the defendant cannot reasonably be faulted" in evaluating a speedy trial claim).

Similarly, here, the State has an obligation to fund the criminal justice system in a way that does not violate a suspect's Sixth Amendment right to a speedy trial and the public's expectation of timely justice. *See Spivey*, 357 N.C. at 131 n. 2, 579 S.E.2d at 263 n. 2 (Brady, J., dissenting) ("At some point . . . budgetary constraints can no longer justify . . . waiting periods for criminal defendants. . . . [C]rowded dockets . . . must eventually yield to both a suspect's Sixth Amendment right to a speedy trial and the public's expectation of timely justice.").

Moreover, the successful and efficient administration of government assumes the legislative branch will fulfill this obligation. Where it fails to do so, it is the fault of the State and judicial oversight must protect an accused's right to a speedy trial. Therefore, this factor should be weighed against the State.

III. Assertion of Right

"A defendant is not required to assert his right to a speedy trial in order to make a speedy trial claim on appeal." *Johnson*, __ N.C. App. at __, 795 S.E.2d at 132-33 (citation omitted). However, the "failure to assert his speedy trial right, or his failure to assert the right sooner in the process, does weigh against his contention that he has been denied his constitutional right to a speedy trial." *Id.* at __, 795 S.E.2d at 133 (citation and internal quotation marks omitted).

Here, defendant asserted his right to a speedy trial four years and eleven months after he was arrested, and the case was called for trial less than four months later. The eleventh-hour nature of this motion carries only minimal weight in defendant's favor. *See id.*

IV. Prejudice

I disagree with the majority's conclusion that defendant did not suffer prejudice as a result of the delay. I would hold that defendant established the presumptive prejudice that naturally accompanies an extended pretrial incarceration.

"Prejudice[ ] should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." *Pippin*, 72 N.C. App. at 396, 324 S.E.2d at 906 (alteration, citation and internal quotation marks omitted). The constitutional right to a speedy trial: (i) prevents oppressive pretrial incarceration; (ii) minimizes the accused's anxiety and concern; and (iii) limits the possibility that the defense will be impaired. *Id.* (citation omitted).

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Id. at 396, 324 S.E.2d at 907 (citations and internal quotation marks omitted).

Here, the majority determined defendant was not prejudiced because defendant's ability to defend his case was not impaired, and defendant did not demonstrate that his incarceration detrimentally impacted his life. While I agree the delay did not impede defendant's ability to defend his case, I would hold that defendant established the presumptive prejudice that naturally accompanies an extended pretrial incarceration. Nonetheless, absent a more concrete showing of actual prejudice, this fourth factor weighs only slightly in defendant's favor.

V. Conclusion

Having considered the *Barker* factors and the relevant circumstances before the Court, I would hold defendant demonstrated that his constitutional right to a speedy trial was violated. Accordingly, I would reverse the trial court's denial of defendant's motion.

STATE OF NORTH CAROLINA
v.
TYLER DEION GREENFIELD, DEFENDANT

No. COA17-802

Filed 4 December 2018

1. Criminal Law—prosecutor's closing argument—no objection

In a murder trial, where defendant did not object to two statements made by the prosecutor during closing argument, the trial court was not required to intervene ex mero motu when the prosecutor stated that defendant did not accept responsibility for his actions and suggested, without evidence, that defendant might have committed another offense. Without an objection, defendant failed to preserve any constitutional arguments and the prosecutor's statements, even if erroneous, did not amount to plain error and were not so grossly improper as to warrant intervention.

2. Evidence—character—victim as aggressor—specific instances of conduct

In a murder trial, the trial court did not err by excluding defendant's evidence that the deceased victim was a gang leader, had a "thug" tattoo, and possessed firearms, none of which involved "specific instances of conduct" pursuant to Evidence Rule 405(b). Defendant failed to challenge on appeal the trial court's

exclusion, pursuant to Evidence Rule 403, of the victim's prior conviction for armed robbery, a decision properly made within the court's discretion.

3. Evidence—opinion testimony—detective—whether defendant confessed

In a murder trial, defendant's argument that the trial court committed plain error by allowing a detective to opine that defendant "had already confessed to felony murder" was moot where the Court of Appeals decided to reverse defendant's felony murder conviction on other grounds. Even if not moot, any error did not amount to plain error.

4. Homicide—first-degree felony murder—jury instructions—multiple victims—intended victim

In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI), the trial court committed reversible error in its jury instructions for first-degree felony murder based on AWDWIKISI where the jury marked the verdict sheet finding defendant guilty of both first-degree felony murder and second-degree murder for a single homicide. The jury instructions should have made clear that defendant could be convicted of first-degree felony murder based on AWDWIKISI only if the jury believed the fatal bullet was meant for the second victim, and instead hit the first victim. Neither the jury instructions nor the verdict sheet helped illuminate what the jury believed defendant's intention was when he shot at the victims, necessitating reversal of the first-degree murder conviction.

5. Homicide—second-degree murder—multiple victims—intended victim

In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury, the jury's verdict finding defendant guilty of second-degree murder was not in error whether the jury believed defendant intended to shoot at the first victim (who died) or at the second victim (who was injured), because the jury was given the opportunity to acquit based on self-defense against the first victim, but declined to do so, and self-defense was not available regarding the second victim. Judgment entered upon the jury's other verdict finding defendant guilty of first-degree felony murder for the same homicide was vacated based on grounds stated elsewhere in the opinion, and the matter remanded for entry of judgment on second-degree murder.

6. Assault—assault with deadly weapon with intent to kill inflicting serious injury—jury instructions—self-defense

In a trial for murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI), the trial court committed reversible error by failing to provide a self-defense instruction regarding the assault charge. Without knowing whether the jury believed that defendant intended to shoot at the first victim (who died) or at the second victim (who was injured), the jury's verdict of guilty for second-degree murder of the first victim, for which defendant was entitled to a self-defense instruction, would be inconsistent with a verdict of guilty of AWDWIKISI, because they are each predicated on a different intended victim. The conviction for AWDWIKISI was vacated and remanded for a new trial.

Judge STROUD dissenting.

Appeal by Defendant from judgments entered 23 February 2017 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 8 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jess D. Mekeel, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for the Defendant.

DILLON, Judge.

Defendant appeals his convictions for first-degree felony murder and for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI). For the following reasons we reverse the judgments and remand as follows: (1) with respect to the AWDWIKISI conviction, Defendant is entitled to a new trial; and (2) with respect to the first-degree felony murder conviction, the trial court shall vacate that judgment and enter judgment convicting Defendant of second-degree murder.

I. Background

Defendant was convicted of assault and murder for shooting two victims, killing one of them, during a drug deal gone bad.

On 2 February 2015, Defendant was at Jon's[1] home to buy marijuana. Jon's girlfriend, Beth, was also there. The State's evidence tended to show that Defendant shot Jon and Beth while trying to rob Jon.

Defendant, however, testified as follows: Defendant went to buy marijuana from Jon. While in Jon's living room, Defendant picked up a gun from Jon's coffee table which he thought "looked cool." As Defendant was inspecting Jon's gun, Beth became nervous and pointed a gun at Defendant. Defendant then threatened to shoot Beth if Beth did not put her gun down. Beth put down her gun, and Defendant turned to leave. As Defendant was leaving, Jon shot at Defendant. Fearing for his life, Defendant returned fire, intending to shoot Jon but not intending to shoot Beth. Some of Defendant's return fire killed Jon and injured Beth.

Defendant was tried for killing Jon and for assaulting Beth. The jury was instructed on the doctrine of "transferred intent." The jury was also instructed on "self-defense" as to the murder charge but not the assault.

For Jon's death, the jury indicated on the verdict sheet that it had found Defendant guilty of *both* first-degree felony murder (based on the felony of AWDWIKISI) and of second-degree murder. Based on this verdict, the trial court entered judgment convicting Defendant of the greater charge, first-degree felony murder.

For the assault on Beth, the jury found Defendant guilty of AWDWIKISI. The trial court entered judgment based on this verdict.

The trial court sentenced Defendant to life imprisonment without parole. Defendant timely appealed.

II. Analysis

Defendant argues that the trial court committed four errors. We conclude that, except with respect to error in the jury instruction, the trial court did not commit reversible error, as explained in Section II. A. below.

We conclude that the trial court did commit reversible error in its jury instructions resulting in Defendant's convictions for the assault of Beth and the first-degree felony murder of Jon. However, we conclude that the error did not affect the jury's verdict that Defendant had committed second-degree murder when he shot Jon. Accordingly, for the reasons stated in Section II. B. below, we vacate the judgments entered

1. Pseudonyms are used to protect the identities of the victims.

convicting Defendant of assault and first-degree felony murder and remand for a new trial on the assault charge for the assault on Beth and for entry of judgment for second-degree murder for the death of Jon.

A. Defendant's Arguments Concerning Closing Argument and Evidence

Defendant makes three arguments, unrelated to the jury instructions, which we conclude do not warrant relief on appeal. We address each in turn.

1. Prosecutor's Closing Argument

[1] Defendant argues that the trial court failed to intervene *ex mero motu* concerning two statements made by the prosecutor during closing arguments.

Defendant complains of the prosecutor's statement that "[t]he reason we're here [is that] the defendant will not accept responsibility for his actions." Defendant argues that "[t]he prosecutor's statement invited the jury to hold against [Defendant] his invocation of his constitutional right to plead not guilty and to stand trial before an impartial jury." Our Supreme Court, however, has held that constitutional arguments regarding closing instructions which are not objected to are waived:

> Defendant seeks a new trial on the ground that the court's errors [in not intervening *ex mero motu* during the prosecutor's closing based on the State and Federal constitutions and on N.C. Gen. Stat. § 15A-1230].
>
> Because defendant did not object to any of these arguments below, no constitutional argument could have been presented to the trial court. As noted above, failure to raise a constitutional issue at trial generally waives that issue for appeal. [Citations omitted.] Accordingly, we will review these purported errors for a violation of N.C.G.S. § 15A-1230.

State v. Phillips, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011).

Here, Defendant did not object to the prosecutor's statement. Therefore, we are compelled to conclude that Defendant has failed to preserve any constitutional argument concerning the prosecutor's statement. And unlike the defendant in *Phillips*, Defendant here has not made any argument under N.C. Gen. Stat. § 15A-1230. Further, we conclude that any error in this regard did not amount to plain error. Therefore, Defendant's argument concerning this statement is overruled.

Defendant also complains of the prosecutor's statement that "[p]erhaps [Defendant] had [the weapon] in some other robbery [and] discharged it then." This statement suggests that Defendant may have committed another offense, though there is no evidence that he had done so. The State contends the statement was relevant to the prosecution's theory that Defendant had disposed of the weapon shortly after the shooting, which was evidence of Defendant's guilt.

Defendant did not object to the statement. Where there is no objection, our standard of review is whether the remarks were "so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998).

We have reviewed the prosecutor's statement in context with the entire closing argument, and we conclude that the statement, if improper, was not so grossly improper to require intervention by the trial court. In so holding, we note other cases where similar or more inflammatory statements were held not to require intervention by the trial court. *See*, *e.g.*, *State v. Marino*, 229 N.C. App. 130, 135, 747 S.E.2d 633, 637 (2013) (holding that a prosecutor's speculation "that this was not the first time defendant had driven impaired," while improper, did not warrant a new trial). *See also State v. Oxendine*, 330 N.C. 419, 423, 410 S.E.2d 884, 886 (1991). Therefore, we conclude that the trial court did not commit reversible error by failing to intervene *ex mero motu* during the prosecutor's closing argument.

2. Evidence Concerning Character of the Victim

[2] Defendant argues that the trial court erred in excluding evidence that the deceased victim (Jon) was a gang leader, had a "thug" tattoo, and had previously been convicted of armed robbery. Defendant contends that he had offered this evidence to show Jon's violent character which would be relevant to his self-defense argument. Defendant argues that the evidence was admissible under Rules 404(a) and 405(b) of our Rules of Evidence and that the trial court's refusal violated his constitutional right to present his defense.

Rule 404(a) provides that an accused may offer evidence of "a pertinent trait of [the victim's] character." N.C. Gen. Stat. § 8C-1, Rule 404(a) (2017). Our Supreme Court has stated that a defendant claiming self-defense "may produce evidence of the victim's character tending to show [] that the victim was the aggressor" and may be done so "through testimony concerning the victim's general reputation for violence[.]" *State v. Corn*, 307 N.C. 79, 85, 296 S.E.2d 261, 265-66 (1982).

Rule 405 of our Rules of Evidence provides *how* character evidence may be offered. N.C. Gen. Stat. § 8C-1, Rule 405 (2017). Rule 405(a) states that evidence concerning the victim's reputation may be offered. *Id.* Rule 405(b) states that evidence concerning "specific instances of [the victim's] conduct" may be offered. *Id.* Defendant specifically argues that his evidence concerning Jon's character was admissible under Rule 405(b); he makes no argument under Rule 405(a).

We conclude that the evidence concerning Jon's gang membership, his possession of firearms, and his tattoo do not involve "specific instances of conduct" admissible under Rule 405(b). Therefore, we conclude that the trial court did not err by excluding this evidence. Further, we note that there was evidence presented to the jury that Jon was a drug dealer and possessed multiple guns in his residence at the time of the shooting.

Regarding the victim's prior conviction for armed robbery, the trial court specifically ruled that the evidence was inadmissible under Rule 403, based on its conclusion that unfair prejudice outweighed the probative value of the evidence. *State v. Coffey*, 345 N.C. 389, 404, 480 S.E.2d 664, 673 (1996) (stating that the trial court may still exclude otherwise admissible evidence if it determines that "its probative value [is outweighed by] the danger of unfair prejudice"). Whether otherwise admissible evidence should be excluded under Rule 403 is left to the sound discretion of the court. *State v. Hoffman*, 349 N.C. 167, 184, 505 S.E.2d 80, 90-91 (1998). Here, Defendant has made no argument that the trial court erred in excluding Jon's prior conviction under Rule 403. Therefore, we conclude that Defendant failed to meet his burden on appeal as to this issue.

3. Detective's Opinion Testimony

[3] Defendant argues that the trial court committed plain error by allowing a detective testifying for the State to express his "opinion [that Defendant] had already confessed to felony murder." Our Supreme Court has stated that it reviews "unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). Under Rule 10(a)(4) of our Rules of Appellate Procedure, an appellant must demonstrate that a "judicial action" amounted to error. Presumably, here, Defendant is arguing that the trial court should have intervened to strike the detective's testimony concerning his belief that Defendant had confessed to felony murder. Assuming, *arguendo*, that the trial court committed error, we conclude

that the argument is moot in light of our reversal of Defendant's felony murder conviction, as explained in Section II. B. below. Further, assuming that the argument is not moot, we conclude that any error by the trial court was not "so basic, so prejudicial, so lacking in its elements that justice cannot have been done," and, therefore, did not rise to the level of plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

B. Jury Instructions on "Transferred Intent" and "Self-Defense"

[4] We conclude that the jury instructions require us to vacate Defendant's convictions for the assault of Beth and the first-degree felony murder of Jon, but not for the jury's verdict finding Defendant guilty of the second-degree murder of Jon. But before discussing our conclusions regarding the jury instructions as to each charge specifically, we first discuss generally the "transferred intent" and "self-defense" instructions given to the jury.

1. Transferred Intent

The trial court gave a general instruction on "transferred intent." Our Supreme Court has described transferred intent as follows:

> It is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that "The malice or intent follows the bullet."

State v. Wynn, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971).[2] Therefore, under the "transferred intent" rule, if a defendant shoots at A in the heat of passion, without malice, but hits B, he is guilty of voluntary manslaughter. If he shoots A in self-defense but hits B, he is not guilty by reason of self-defense.

The instruction regarding transferred intent given in this case was an accurate statement of the law. The trial court told the jury:

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2. This holding in *Wynn* regarding "transferred intent" was most recently affirmed by our Supreme Court in 1998 in S*tate v. Davis*, 349 N.C. 1, 37, 506 S.E.2d 455, 475 (1998) and by our Court just last year in *State v. Cox*, ___ N.C. App. ___, ___, 808 S.E.2d 339, 348 (2017).

> If the defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim.

This instruction, as given, allowed the jury to convict Defendant for killing Jon even if they believed Defendant was *intending* to shoot Beth when he hit Jon. And it allowed the jury to convict Defendant for assaulting Beth even if they believed Defendant was intending to shoot Jon when he hit Beth.

2. Self-Defense

The State's evidence tended to show that Defendant shot both Jon and Beth during a robbery attempt. Defendant admitted that he shot Jon and Beth, but only to protect himself. Specifically, Defendant testified that (1) Jon shot first; (2) Defendant then returned fire in self-defense as he tried to escape the room in fear that Jon was going to kill him; and (3) Defendant was only trying to hit Jon in his return fire; he was not shooting at Beth.

When instructing on the homicide of Jon, the trial court instructed the jury that it could find Defendant not guilty or guilty of a lesser charge based on self-defense. But the trial court did not instruct the jury on self-defense with respect to the assault on Beth. The instruction on this count, coupled with the transferred intent instruction, created a likelihood of confusion within the jury. Based on our State's jurisprudence, as explained below, the application of self-defense does not turn on whom Defendant actually shot, but rather on whom he intended to shoot. That is, as explained below, Defendant was entitled to a self-defense instruction on the homicide of Jon and the assault of Beth, but only if the jury determined that those crimes were committed with shots *intended* for Jon.

Defendant was *not* entitled to any self-defense instruction for the shots which the jury determined he *intended* for Beth, whether they struck Beth or Jon. Defendant was not so entitled because he testified that he did not intend to hit Beth, but that he was only shooting at Jon. Defendant also testified that he was only in imminent fear of being killed by Jon. He testified that Beth had already put down her gun before he returned fire. *See, e.g.*, *State v. Cook*, ___ N.C. App. ___, ___, 802 S.E.2d 575, 577 (2017), *affirmed per curiam*, 370 N.C. 506, 809 S.E.2d 566 (2018) (holding that a defendant was not entitled to a self-defense instruction where he testified that he was not intending to shoot the victim when he fired the gun).

But based on Defendant's testimony, he *was* entitled to the self-defense instruction for all the shots he intended to fire at Jon, *whether they actually killed Jon or injured Beth*. That is, based on Defendant's testimony that Jon was shooting at Defendant, Defendant was entitled to the self-defense instruction with regard to any shots the jury determined he *intended* for Jon and which hit Jon. And based on the "transferred intent" instruction, Defendant was also entitled to a "self-defense" instruction with regard to any shots intended for Jon *but which* actually struck Beth.

C. Jury Verdicts and Judgments

1. Count 1 – Homicide of Jon

On Count 1, Defendant was charged with Jon's homicide. The trial court instructed the jury on a number of theories, including first-degree felony murder, first-degree premeditation/deliberation murder, second-degree murder, and voluntary manslaughter.

On its verdict sheet, the jury checked boxes indicating that it was finding Defendant guilty of *both* first-degree felony murder, based on the felony of AWDWIKISI, *and* of second-degree murder. Based on this verdict (and because Defendant only killed one person), the trial court entered judgment only on the greater charge, first-degree felony murder.

a. First-Degree Felony Murder Judgment – Reversible Error

We conclude that the jury instructions concerning first-degree felony murder based on AWDWIKISI constituted reversible error because the instructions allowed the jury to convict Defendant on this theory even if they believed that Defendant *had intended* to shoot Jon rather than Beth with the fatal shot(s). Specifically, it would be error for the jury to base its felony murder conviction for the killing of Jon on a felony that Defendant *was intending to assault Jon*.

Where a defendant intentionally assaults A with a gun which causes A's death (and there is no other felony involved), the State cannot elevate an otherwise act of second-degree murder or voluntary manslaughter to first-degree murder based solely on the fact that the defendant committed the deadly assault with a deadly weapon. Otherwise, *every instance* where a defendant commits a homicide with a gun would constitute first-degree felony murder.[3]

3. If every homicide involving a deadly weapon were elevated in this manner, a defendant who shoots his spouse in the heat of passion, without premeditation and deliberation, would be liable for first-degree felony murder rather than simply voluntary manslaughter.

Based on a holding by our Supreme Court, however, if the jury believed that Defendant *intended* to shoot Beth with the shot(s) that killed Jon, the jurors were free to convict Defendant of first-degree felony murder based on AWDWIKISI. Specifically, in *State v. Terry*, our Supreme Court held that a defendant who fires a deadly weapon at A (Beth, in our case), but hits B (Jon), is guilty of first-degree felony murder of B (Jon), based on the fact that the defendant was committing the felony of assault with a deadly weapon on A when he killed B. *State v. Terry*, 337 N.C. 615, 622, 447 S.E.2d 720, 723-24 (1994). Though this holding seems to be in direct conflict with the "transferred intent" rule stated by our Supreme Court in *Wynn*, we are bound to follow it.[4]

We, however, cannot determine from the jury instructions or from the verdict sheet whether the jury believed Defendant, when he shot Jon, was *intending* to shoot Jon or *intending* to shoot Beth. That is, the instructions did not clearly inform the jury that it could find Defendant guilty of first-degree felony murder based on AWDWIKISI *only if* it determined that the fatal bullet was meant for Beth. And there was evidence presented from which the jury could have inferred either finding. Therefore, we conclude that the jury instructions with respect to Defendant's conviction for first-degree felony murder constituted reversible error.

b. Second-Degree Murder Verdict – No Reversible Error

[5] In addition to finding Defendant guilty of first-degree felony murder for Jon's death, the jury also found Defendant guilty of second-degree murder. As stated above, the trial court entered judgment only on the first-degree felony murder verdict.

Second-degree murder occurs where a defendant kills another human being with malice. *State v. Williams*, 288 N.C. 680, 691, 220 S.E.2d 558, 567 (1975). Where the defendant uses a deadly weapon to commit an assault, malice can be presumed. *State v. Lang*, 309 N.C. 512, 525-26,

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Or a defendant who shoots and kills someone with malice, but without premeditation and deliberation, would still be guilty of first-degree murder rather than second-degree murder. Such results are clearly not the intent of the General Assembly, nor are they reflected in our Supreme Court's jurisprudence.

4. In *Terry*, the Supreme Court did not apply its "transferred intent" rule to determine defendant's culpability when he fired at A but shot B. Rather, the Court held that first-degree felony murder was appropriate, notwithstanding whether the defendant shot with premeditation or merely in the heat of passion. Accordingly, it could be argued that *Terry* conflicts with the statement in *Wynn* that "the malice or intent follows the bullet."

308 S.E.2d 317, 323-24 (1983). "[A] pistol or a gun is a deadly weapon." *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922).

In this case, on the charge of second-degree murder, the jury was instructed on self-defense. We conclude that, for this jury verdict, there was no reversible error. It does not matter whether the jury believed Defendant was shooting at Jon or at Beth when he killed Jon. If the jury believed Defendant was shooting at Jon, the verdict is valid because the jury was given the opportunity to acquit based on self-defense, but declined to do so. And if the jury believed that Defendant shot Jon while trying to shoot Beth, he was not entitled to a self-defense instruction with respect to any shot intended for Beth because he testified that he was not in imminent fear of Beth.

c. Mandate on Homicide Count

We vacate the judgment convicting Defendant guilty of first-degree felony murder. But since there was no reversible error with respect to the second-degree murder verdict, based on the reasoning of our Supreme Court in *State v. Stokes*, we remand for entry of judgment convicting Defendant of second-degree murder.[5] *State v. Stokes*, 367 N.C. 474, 479-80, 756 S.E.2d 32, 36 (2014).

2. AWDWIKISI of Beth

[6] The trial court instructed the jury that it could convict Defendant of AWDWIKISI for the injuries to Beth. The trial court did not give an instruction of self-defense as to this charge. This was error because we do not know if the jury determined that the shot that struck Beth was meant for Jon, which may have been legally justified under self-defense, or if it was meant for Beth. That is, with the transferred intent instruction, it is possible that the jury convicted Defendant of AWDWIKISI, though believing that Defendant intended all his shots to hit Jon, as he testified. And based on transferred intent, he should have been acquitted if the jury believed he was firing at Jon in self-defense. As our Supreme Court stated in *Wynn* with respect to transferred intent: "Such a person is guilty or *innocent* exactly as [if] the fatal act had caused the death of his adversary." *Wynn*, 278 N.C. at 519, 180 S.E.2d at 139 (emphasis added).

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5. In *Stokes*, our Supreme Court cited a line of cases with approval where there was evidence to support a conviction of a greater charge, but the instructions left out an essential element of that greater charge, resulting in an instruction on a lesser charge. *State v. Stokes*, 367 N.C. 474, 479-80, 756 S.E.2d 32, 36 (2014). The Court held that it was appropriate to remand for entry on the lesser charge. *Id.*

The State might argue that the failure to instruct on self-defense was not prejudicial because the jury must have determined that Defendant did not shoot at Jon in self-defense based on the finding of guilt for second-degree murder. But this ignores the possibility that the jury found Defendant guilty of second-degree murder for shots intended for Beth, for which he was not entitled to any self-defense instruction, and that the jury found Defendant guilty of assaulting Beth with shots intended for Jon, for which he was entitled to a self-defense instruction. We simply cannot know what the jury was thinking. Therefore, Defendant is entitled to a new trial with respect to the assault charge. On remand, assuming the evidence is the same, the jury must be instructed on self-defense for the shots the jury believed were intended for Jon that hit Beth.

III. Conclusion

The judgments below are vacated. Defendant is entitled to a new trial with respect to the AWDWIKISI conviction. Regarding the first-degree felony murder conviction, we remand for entry of judgment convicting Defendant of second-degree murder.

VACATED AND REMANDED.

Judge INMAN concurs.

Judge STROUD dissents by separate opinion.

STROUD, Judge, dissenting.

I concur in the result of the majority opinion in granting defendant a new trial on AWDWIKISI, but I dissent on the remainder of the charges because I would grant defendant a new trial on all charges. The facts and resulting various charges were somewhat confusing on their own, but the jury instructions and verdict sheet only made the case more confusing by muddling the issues, elements, and legal standards applicable to each charge. Portions of the jury instructions misstated the law and overall the instructions are likely to have misled the jury. Although some portions of the jury instructions are correct statements of the law, it is not possible to separate the AWDWIKISI conviction from the tangled mess of theories and charges. I would therefore reverse and grant a new trial on all charges.

I briefly restate the background since it is important to an understanding of the issues and appropriate jury instructions. On 2 February

2015, defendant and a friend went to Jon's[1] home to buy marijuana. An altercation started and shots were fired by at least three guns. Jon ultimately died from gunshot wounds. Defendant and Jon's girlfriend, Beth, were also shot but survived. The State and defendant presented different theories at trial on what happened between defendant's arrival at Jon's home and the shootings. The State's theory of the case was that defendant and his friend attempted to rob Jon and murdered him: defendant attempted to rob Jon at gunpoint; Beth grabbed a gun; defendant threatened to shoot Jon in the head if Beth did not put her gun down; Beth put the gun down; and defendant began firing, striking both Jon and Beth. Defendant's theory of the case was self-defense: he went to buy marijuana from Jon and saw a gun on the coffee table; he picked it up to look at it because it "looked cool" "like something off a movie[;]" Jon "started going crazy[;]" Beth grabbed a gun and pointed it at defendant; defendant threatened to shoot if Beth did not put the gun down; Beth put the gun down; defendant turned to run and Jon shot him; defendant began shooting behind himself "as many times as I can till I got to the door."

Defendant was indicted for first and second-degree murder and attempted robbery with a dangerous weapon of Jon and the attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI") of Beth. Defendant argued self-defense to the jury. The jury found defendant guilty of first-degree felony murder with the underlying felony being assault, second-degree murder, and AWDWIKISI. The trial court sentenced defendant to life imprisonment without parole. Defendant appealed.

Defendant challenges the jury instructions regarding self-defense. Defendant contends the trial court should have provided a self-defense instruction for the AWDWIKISI and felony murder charges. Defendant argues that

> [b]y limiting the jury instructions so that self-defense could not be applied to the assault charges against . . . [Beth] – standing alone or underlying the felony-murder charge – the trial court usurped the jury's function, and Mr. Greenfield was denied his right to present a defense and to a trial by jury.

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1. Pseudonyms will be used to protect the identity of the participants who were not charged with a crime in this case and the deceased victim.

Defendant specifically contends that within the trial court's self-defense instruction it should have included his proposed instruction on transferred intent because defendant's "intent of defending himself against . . . [Jon] transferred to the shooting of . . . [Beth]."[2]

We review jury instructions as a whole to determine if the law was presented correctly and to ensure that the jury was not misled regarding the applicable law:

> This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury. If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance.

State v. Cornell, 222 N.C. App. 184, 190–91, 729 S.E.2d 703, 708 (2012) (citation, ellipses, and brackets omitted). This Court's review of the jury instructions as a whole is conducted *de novo*. *See State v. Cruz*, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50, *aff'd per curiam*, 364 N.C. 417, 700 S.E.2d 222 (2010) ("Our Court reviews a trial court's decisions regarding jury instructions *de novo*.").

> The trial court must instruct the jury on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for defendant to kill his adversary in order to protect himself from death or great bodily harm.

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2. Under the doctrine of transferred intent "[i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. . . . Such a person is guilty or innocent exactly as if the fatal act had caused the death of his adversary. It is aptly stated that the malice or intent follows the bullet." *State v. Goode*, 197 N.C. App. 543, 550, 677 S.E.2d 507, 512 (2009) (citation, quotation marks, and brackets omitted).

> Moreover, the trial court must provide a self-defense instruction if the above criteria is met even though there is contradictory evidence by the State or discrepancies in the defendant's evidence. With regard to whether a defendant is entitled to a jury instruction on self-defense, the trial court must consider the admissible evidence in the light most favorable to the defendant.
>
> > Before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

Id. at 235-36, 691 S.E.2d at 50-51 (citations, quotation marks, and brackets omitted).

The trial court did not provide a self-defense instruction in general on the AWDWIKISI or felony murder charge; furthermore, the trial court did not provide a transferred intent instruction on the one self-defense instruction it did provide on first and second-degree murder and voluntary manslaughter. Thus, the only specific self-defense instruction the jury received was as to Jon, and not to Beth:

> The defendant would be excused of first-degree murder on the basis of malice, premeditation, and deliberation, and second-degree murder on the ground of self-defense if, first, the defendant believed it was necessary to kill the victim in order to save the defendant from death or great bodily harm.
>
> And second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

The State does not argue that defendant did not present evidence which would support his theory of self-defense, but only that defendant was not credible and that since the trial court instructed the jury on

self-defense as to some of the charges, the jury instructions as a whole were sufficient. This argument fails for two reasons. The defendant's credibility is not a consideration for this Court; that is a determination for the jury to make. *See State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) ("It is fundamental to a fair trial that the credibility of the witnesses be determined by the jury."). Also, when reviewing a trial court's failure to instruct jurors on a self-defense theory, this Court must consider the evidence in the light most favorable to defendant. *See Cruz*, 203 N.C. App. at 235, 691 S.E.2d at 51. Defendant's evidence presented at trial, if believed, would support an instruction of self-defense on both the AWDWIKISI and felony murder charges as he testified: he went to Jon's home to buy marijuana, with no intent to rob anyone; Jon became so upset when he picked up a gun to look at it that Beth intervened pointing a gun at him; and he was the first person shot, as he was trying to run away, shooting back only to defend himself.

Thus, the jury retired to deliberate with the self-defense instruction applying only to "COUNT 1" for "First-Degree Murder with Premeditation and Deliberation Or Second-Degree Murder Or Voluntary Manslaughter" against Jon. Further compounding the lack of a self-defense instruction, the State's closing argument repeatedly stressed that self-defense could not be used for felony murder stating,

> Premeditation, deliberation, malice. These are all concepts we'll talk about in just a second, but they don't apply to felony murder. Also what doesn't apply is self-defense. Self-defense also doesn't apply to felony murder. . . .
>
> . . . Self-defense does not apply to felony murder. Again, stress that over and over again. There's not a need to apply self-defense to felony murder that the defendant is charged with.

Thus, with these confusing instructions and statements from the State, the jury retired to deliberate with a somewhat confusing verdict sheet. The verdict sheet presented options for eight different theories of murder or manslaughter under COUNT 1, and the jury was instructed on self-defense as applied to only three of those eight theories. The verdict sheet with the jury's answers to the various theories shows the following for the crimes listed under COUNT 1:

COUNT 1[3]

✓ Guilty of First-Degree Murder;

Under the felony-murder rule, determine whether the defendant committed: (Mark all that apply)

_____ Attempted Robbery

_____ Attempted First-Degree Murder

✓ Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury

_____ Assault with a Deadly Weapon Inflicting Serious Injury

_____ Assault with a Deadly Weapon with Intent to Kill

_____ Or Not Guilty

Or

_____ First-Degree Murder with Premeditation and Deliberation

Or

✓ Second-Degree Murder

Or

_____ Voluntary Manslaughter

Or

_____ Not Guilty

The verdict sheet is confusing, even to this Court. The jury indicated its confusion as well when it wrote a note to the court asking, "Please explain why it matters that we address both theory's since it[']s for the same count? Why is there an 'or' instead of an 'and' in the charge sheet."

Adding one more layer of confusion, instead of giving the self-defense instructions as requested by defendant, the trial court instead instructed the jury on accident "[a]s to the charges of attempted murder and assault with a deadly weapon with intent to kill inflicting serious

3. The verdict sheet did not identify the victim of each Count. Jon was the victim of each crime under Count 1, but four of the underlying felonies could have been regarding Beth. The crimes against Beth were therefore identified both in Count 1, as potential felonies to support felony murder, and separately in Counts 2 and 4 for attempted first-degree murder and the three forms of assault.

injury of" Beth. After the instructions were given, defense counsel noted his objection to the accident instruction:

> the language in it that an injury is accidental if it's unintentional, and Judge, I believe that under self-defense an act under self defense would be an intentional act, just that it would lawfully be an intentional act.
>
> THE COURT: I understand what you're saying but I did not give a self-defense instruction for that.
>
> MR. SHOTWELL: I understand, but I'm saying under the theory that if his actions were lawful under self-defense, then by definition they would be intentional.

Thus, in summary, the trial court's instructions deliberately separated the instruction for first-degree murder based on premeditation and deliberation, second-degree murder; and voluntary manslaughter for which self-defense would apply from the felony murder instructions for which self-defense would not apply. The trial court then instructed on accident, although there was no evidence to support this instruction, and did not instruct on self-defense for AWDWIKISI and felony murder, though there was evidence to support those instructions. Ultimately, the jury found defendant not guilty of attempted robbery with a deadly weapon and did not use this as the basis for the felony murder conviction; this part of the verdict indicates that the jury did not believe the State's theory of the case that defendant went to Jon's home and attempted to rob him. The jury actually found defendant guilty of felony murder based only on "Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury[;]" this is the same crime they found defendant guilty of committing against Beth; this is the crime for which defendant unsuccessfully requested a self-defense instruction.

Overall, considering the instructions in their entirety, with the lack of a self-defense instruction which was supported by the evidence, the inclusion of an accident instruction which was not supported by the evidence, the State's jury argument emphasizing that self-defense could not be used for felony murder, the layout of the verdict sheet and the jury's question about it, and the not guilty verdict as to attempted robbery with a deadly weapon, I would conclude the jury may have been "misled" by the jury instructions and the result may have been different if the jury had been instructed on self-defense as to AWDWIKISI. Generally *Cornell*, 222 N.C. App. at 191, 729 S.E.2d at 708.

I would therefore reverse defendant's convictions and grant defendant a new trial on all charges.

STATE v. HAMILTON

[262 N.C. App. 650 (2018)]

STATE OF NORTH CAROLINA
v.
BRODIE LEE HAMILTON, DEFENDANT

No. COA17-1365

Filed 4 December 2018

1. Criminal Law—discovery—blank audio recording

In a prosecution for trafficking methamphetamine, the trial court did not err by denying defendant's motion to dismiss for a violation of his constitutional rights where the State did not preserve or disclose a blank audio recording. An officer did not act in bad faith where he attempted to record a conversation between an informant and defendant setting up a drug transfer, but the recording device was new and the officer was unsuccessful. While the blank audio recording may have had the potential to be favorable, defendant did not demonstrate that it was material. To the extent that the recording implicated credibility, it was the officer's credibility, not the informant's.

2. Discovery—criminal law—failure to disclose—no sanctions

In a prosecution for trafficking methamphetamine, the trial court did not abuse its discretion by denying defendant's motion for sanctions for a discovery violation where an officer unsuccessfully attempted to record a conversation setting up a drug transfer and the resulting blank recording was neither preserved nor disclosed. The trial court's decision was not arbitrary and was based on its consideration of the materiality of the blank audio file, the circumstances of the failure to provide a complete file to the district attorney's office, the officer's experience and reputation, the evidence itself, and the arguments of counsel.

3. Criminal Law—jury instructions—special request—failure to disclose evidence

In a prosecution for trafficking methamphetamine, the trial court did not err by refusing defendant's requested instruction about the State's failure to disclose a blank recording of defendant's conversation with an informant. The officer testified that the recording device was new and that his attempt to make the recording was not successful. Defendant did not establish bad faith by the officer and did not show that the blank audio recording contained any exculpatory evidence.

Appeal by defendant from judgments entered 27 January 2017 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 17 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel P. Mosteller, for the State.

Meghan Adelle Jones for defendant-appellant.

BERGER, Judge.

A Macon County jury convicted Brodie Lee Hamilton ("Defendant") of multiple charges of trafficking methamphetamine and one charge of conspiracy to traffic methamphetamine. For these convictions, the trial court sentenced Defendant to three consecutive terms of 225 to 282 months in prison, and fined him $750,000.00. Defendant appeals, alleging the trial court erred in (1) denying his motion to dismiss, (2) denying his motion for sanctions, and (3) not providing a special instruction to the jury that had been requested. All three of Defendant's allegations of error are based on a discovery dispute in which the State had failed to disclose a blank audio recording. After review, we disagree with Defendant's contentions and find no error.

Factual and Procedural Background

The Macon County Sheriff's Department received a tip involving drug transportation along a known methamphetamine trafficking route between Atlanta, Georgia and Macon County, North Carolina. The information included specific details about the individuals involved and the vehicle that would be used. Under the direction of Lieutenant Charles Moody ("Lt. Moody"), the department sought to intercept the vehicle by monitoring the back roads of Macon County between the pick-up and drop-off locations.

On June 19, 2015, Jeremy Stanley ("Stanley") and Elizabeth Tice ("Tice") were stopped in Macon County after failing to stop at a stop sign. Stanley told deputies that there was a gun in the vehicle, and a trace of its serial number showed the firearm had been stolen. Both Stanley and Tice were arrested for possession of a stolen firearm. Stanley told deputies he wanted to talk and had additional information about the stolen firearm.

Deputies brought in a K9 unit to conduct a "free air" sniff around the vehicle. The K9 unit alerted on the vehicle, and deputies located more

than two pounds of methamphetamine in a plastic container behind the driver's seat.

Stanley and Tice were then transported to the Macon County Sheriff's Department. Stanley told Lt. Moody that Defendant paid them $17,000.00 to pick up the methamphetamine in Atlanta. Lt. Moody asked Stanley and Tice if they could help prove Defendant was involved by setting up a controlled delivery of artificial methamphetamine. Stanley used Tice's cell phone to call Defendant, told him that they had problems with their vehicle, and arranged for someone to pick up the drugs at the Smokey Mountain Welcome Center. Lt. Moody testified that he "could hear that there was a person on the other end of the line, but [he] couldn't hear what was being said" by that person.

Defendant was not present at the site of the drug exchange, but instead, the exchange was carried out by two of Defendant's associates. Both associates were arrested on site.

On December 14, 2015, the Macon County Grand Jury indicted Defendant for trafficking in methamphetamine by possession, trafficking in methamphetamine by transportation, and conspiracy to traffic methamphetamine. During Defendant's January 2017 trial, defense counsel asked Lt. Moody on cross-examination if he had attempted to record the telephone conversations between Stanley and Defendant. Lt. Moody responded:

> I tried to record the telephone call. I don't normally do that. I had a brand-new tape recorder that had just been purchased. I just used that and a microphone and a suction cup to try to record that call . . . and made that attempt. It wasn't until sometime later that I realized that there's no – there's no real conversation that was captured during that recording.

Defense counsel then informed the trial court that he was unaware of Lt. Moody's attempt to preserve the conversation by audio recording as no such information had been provided in discovery. Defense counsel was permitted to question Lt. Moody outside the presence of the jury:

> [Defense Counsel:] So what was actually recorded in that?
>
> [Lt. Moody:] Nothing.
>
> [Defense Counsel:] Absolutely nothing?

[Lt. Moody:] Nothing. An occasional noise, but you couldn't even make out the words. I didn't do a very good job of the installation. I was not familiar with the equipment or with that particular phone.

. . .

[Defense Counsel:] So you recorded how many phone calls with this device?

[Lt. Moody:] One.

[Defense Counsel:] Which one was that?

[Lt. Moody:] It would have been the first call. And quite honestly, I don't recall if I attempted to record the second one or not. I didn't make any attempt to listen to the recording until a couple of days after that, and there was just nothing there.

[Defense Counsel:] Do we still have the audiotape?

[Lt. Moody:] I don't think so.

THE COURT: What happened to it? I mean, is it a physical tape? Is it digital information?

[Lt. Moody:] It would be a digital tape. . . . A digital – a digital device.

THE COURT: Do you still have that device?

[Lt. Moody:] I don't know, Your Honor. I listened to it – or attempted to listen to the recording several times. There was no recording there. I had other – at least one other officer confirm that there wasn't anything there as well. I don't know if I didn't turn it on, if – if I used – if I placed the microphone on it inappropriately. There was no recording there. . . . There was no – there was no audible information on the recording.

On January 25, 2017, Defendant filed a motion for sanctions seeking dismissal of the charges for what he contended was a willful violation

of North Carolina's discovery statutes and his constitutional rights. The trial court denied his motion for sanctions.

On January 27, 2017, Defendant was convicted on all counts, sentenced to three consecutive terms of 225 to 282 months in prison, and fined $750,000.00. Defendant appeals, arguing the State's failure to provide the blank audio recording in discovery warranted dismissal of the charges against him for violation of his constitutional rights and North Carolina's discovery statutes. Defendant also argues the trial court erred in denying his motion for sanctions and not providing the jury a special instruction on spoliation of evidence. We disagree.

I. Motion to Dismiss

[1] Defendant contends the trial court was required to dismiss all charges for the State's failure to preserve and disclose the blank audio recording of the conversation between Defendant and Stanley. Specifically, Defendant asserts that the State violated his constitutional rights as set forth in *Brady v. Maryland*, 373 U.S. 479 (1963), by failing to turn over information that was favorable and material to guilt or punishment. We disagree.

Standard of Review

The standard of review for alleged violations of constitutional rights is *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

Analysis

A trial court must dismiss criminal charges where a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2017). Defendant has "the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision contemplates drastic relief, such that a motion to dismiss under its terms should be granted sparingly." *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008) (citation and quotation marks omitted).

Pursuant to *Brady v. Maryland*, "[e]vidence favorable to an accused can be either impeachment evidence or exculpatory evidence." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296. Evidence is material if, had the evidence been disclosed, there is a reasonable probability of a different result. *Kyles v. Whitley*, 514 U.S. 419 (1995). Defendant "has the burden

of showing that the undisclosed evidence was material and affected the outcome of the trial." *State v. Tirado*, 358 N.C. 551, 589-90, 599 S.E.2d 515, 541 (2004) (citation omitted). However, Defendant is not required to demonstrate that disclosure of the evidence would have resulted in acquittal, but instead, the failure to provide the evidence undermined confidence in the outcome of the trial. *Kyles*, 514 U.S. at 434.

Moreover, when the unpreserved evidence is "potentially useful," a defendant must demonstrate "bad faith on the part of the police" in order to show a "denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *see also State v. Mlo*, 335 N.C. 353, 373, 440 S.E.2d 98, 108 (1994); *State v. Dorman*, 225 N.C. App. 599, 620, 737 S.E.2d 452, 466 (2013). "[R]equiring a defendant to show bad faith on the part of police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it." *Youngblood*, 488 U.S. at 58. However, "[e]vidence of bad faith standing alone, even if supported by competent evidence, is not sufficient to support a dismissal under N.C. Gen. Stat. § 15A-954(a)(4)." *Dorman*, 225 N.C. App. at 622, 737 S.E.2d at 467.

Here, Defendant had the opportunity to question Stanley about his phone call with Defendant, cross-examine Lt. Moody about destruction of the blank audio recording, and argue the significance of the blank audio recording to the jury. Defendant did just that at trial. Defendant merely demonstrated that the blank audio recording could have been potentially useful. However, Defendant has failed to show bad faith on the part of Lt. Moody. It is undisputed that the blank audio recording had not been disclosed to Defendant and had been subsequently destroyed by Lt. Moody. Defendant's highly speculative assertions about Lt. Moody, standing alone, are insufficient to demonstrate bad faith.

Moreover, while the evidence *may* have had the potential to be favorable, Defendant has failed to demonstrate that the blank audio recording was material. At trial, it was established that Defendant had orchestrated the procurement of a significant quantity of methamphetamine with a series of runners and underlings. Stanley, Tice, and Christopher Prince each provided similar accounts of the role Defendant had played in financing the operation, obtaining the methamphetamine in Atlanta, and transporting that contraband to North Carolina. In light of the evidence at trial, the Defendant's speculation about the contents and significance of a blank audio recording does not undermine confidence in the outcome of his trial.

Defendant argues that "[s]ilence with occasional noises, would have been relevant and highly probative evidence in this case," because it undermined Stanley's credibility and "indicates that Stanley fabricated [Defendant's] involvement." Defendant submits that, because the evidence went to Stanley's credibility, bad faith need not be shown under *Giglio v. United States*, 405 U.S. 150 (1972). *Giglio v. United States*, however, concerned the failure by the prosecution to disclose the existence of a promise not to prosecute "the only witness linking petitioner with the crime." 405 U.S. 150, 151 (1972). That witness had denied the existence of the promise on cross examination, and the attorney for the government, unaware of the promise, informed the jury that the witness had received no such concession. *Id.* The United States Supreme Court stated that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Id.* at 154 (citations and quotation marks omitted).

Such is not the case here. Stanley was not the only link to Defendant's involvement in trafficking methamphetamine. Further, to the extent the blank audio recording implicated any witness' credibility, it was Lt. Moody's, not Stanley's credibility. Stanley played no part in the installation of the recording equipment on the phone, or the preservation, destruction, or failure to disclose the existence of the blank audio recording. Even if the blank audio recording had been available to Defendant, the fact that, in substance, it contained no audible information does not implicate Stanley's credibility. The jury heard, and was able to weigh, Stanley's testimony in light of the fact that the recording was not preserved. Defendant's argument is unpersuasive, and we see no error in the trial court's denial of Defendant's motion to dismiss.

II. Trial Court's Denial of Statutory Sanctions

[2] Defendant next argues the trial court erred in denying his motion for sanctions for failure to preserve and disclose the blank audio recording. We disagree.

Standard of Review

Our Courts have consistently held that a trial court's determination on whether to impose sanctions, pursuant to N.C. Gen. Stat. § 15A-910, for failure to comply with discovery requirements is reviewed for abuse of discretion. *State v. Lane*, 365 N.C. 7, 31, 707 S.E.2d 210, 225 (2011); *see also State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988) ("The sanction for failure to make discovery when required is within

the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion."). A trial court abuses its discretion when its ruling on discovery related sanctions "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Allen*, 222 N.C. App. 707, 733, 731 S.E.2d 510, 528 (2012) (citation and quotation marks omitted).

Analysis

North Carolina's criminal discovery statutes provide that, for the purposes of investigation and prosecution, "law enforcement and investigatory agencies shall make available to the prosecutor's office a complete copy of the complete files." N.C. Gen. Stat. § 15A-903(c) (2017). A file, pursuant to the statute, includes

> defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, *or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant*. When any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.

N.C. Gen. Stat. § 15A-903(a)(1)(a) (emphasis added).

In addition to contempt, a trial court may impose the following sanctions for failure to comply with discovery:

> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (3a) Declare a mistrial, or
>
> (3b) Dismiss the charge, with or without prejudice, or
>
> (4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2017). Before imposing sanctions, however, the trial court "shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply." N.C. Gen. Stat. § 15A-910(b).

Pursuant to Section 15A-903(a), Lt. Moody should have not only documented his efforts to preserve the conversation by audio recording between Stanley and Defendant, but should have also provided the blank audio file to the District Attorney's Office to be turned over to Defendant in discovery because the blank audio recording constituted "any other matter or evidence obtained during the investigation." N.C. Gen. Stat. § 15A-903(a)(1)(a). The statute obviates any requirement that law enforcement evaluate the evidence to determine if it should be turned over to the District Attorney's Office, because anything obtained during the investigation, regardless of perceived evidentiary value, is required to be preserved, documented, and disclosed.

We are not unmindful of the fact that there may be practical barriers for officers and detectives in the field pursuing leads, interviewing witnesses, and securing evidence. Mistakes happen, and operating recording equipment can certainly present problems. Even the most well-intentioned officer can be accused of running afoul of discovery obligations when human fallibility meets technology. The solution in these cases is to document the attempt and turn over the item with that documentation, even if it appears to the officer to lack any evidentiary value. However, the failure to do so does not necessitate the dismissal of charges, or even other lesser sanctions.

At the hearing for Defendant's Motion for Sanctions, the trial court considered the materiality of a blank audio file and the circumstances surrounding Lt. Moody's failure to comply with his obligation to provide his complete file to the District Attorney's Office as required by N.C. Gen. Stat. § 15A-910(b). In denying sanctions, the trial court considered the evidence presented and arguments of counsel concerning the recording. It is uncontroverted that Lt. Moody attempted to record the audio of at least one telephone conversation between Defendant and Stanley. Lt. Moody was unfamiliar with the recording device he used and was not successful in preserving the conversation.

The trial court evaluated Lt. Moody's testimony in light of his considerable law enforcement experience and determined that Lt. Moody's explanation about the events surrounding the recording was credible. The trial court even asked questions of Lt. Moody concerning his failure to preserve the audio file, and stated, "I think he said there was nothing useful on it." The trial court went on to state:

> I think you're – you're speculating as to what happened and whether there was any information there. And the second line as to whether that information might have

> been exculpatory is further speculation. I can't sit here and presume that because the information is not there that it's exculpatory without more, and certainly not with Lieutenant Moody's experience and reputation. I would want more to indulge in any such presumption. It sounds like to me, just to be candid with you, that he bought a piece of electronics and he didn't quite figure out how to use it, because of the gray hair on his head, that the electronics and the details of how to use a new toy like that just didn't – didn't make it into his skill set before he tried to use it. That's what it sounds like to me.
>
> . . .
>
> Nothing came through. Not – not the defendant's voice, nobody's voice. That was what I understood from what he said. There was nothing there.

There is nothing in the record that suggests the trial court's decision not to impose sanctions was so arbitrary that it could not have been the result of a reasoned decision, and we conclude the trial court did not abuse its discretion.

III. Requested Instruction

[3] Defendant alleges the trial court erred when it failed to provide the following requested instruction to the jury:

> When evidence has been received which tends to show that an audio recording of alleged phone calls between Jeremy Stanley and the Defendant was in the exclusive possession of the Macon County Sheriff's Office, has been destroyed and that the Sheriff's Office had notice and understanding of its obligations to preserve and provide its complete investigative file to the Defendant, you may infer, though you are not compelled to do so, that audio recordings would be damaging to the State's case. You may give this inference such force and effect as you determine it should have under all of the facts and circumstances.

We disagree.

Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "[A]n error in jury

instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

Analysis

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citation omitted). "The trial court must give a requested instruction that is supported by both the law and the facts." *State v. Nicholson*, 355 N.C. 1, 67, 558 S.E.2d 109, 152 (2002) (citation omitted).

This Court has previously determined that "destruction of evidence does not amount to the denial of a fair trial unless the defendant can establish (1) the police destroyed the evidence in bad faith; and (2) 'the missing evidence possessed an exculpatory value that was apparent before it was lost.' " *State v. Nance*, 157 N.C. App. 434, 444, 579 S.E.2d 456, 463 (2003) (quoting *State v. Hunt*, 345 N.C. 720, 725, 483 S.E.2d 417, 421 (1997)). In *State v. Nance*, this Court found the trial court did not err when it declined to give a special instruction requested by the defendant concerning lost evidence because defendant failed to meet both prongs of the test set forth in *Hunt*. *Id.* at 445, 579 S.E.2d at 463.

Such is the case here. Again, Defendant has failed to establish bad faith on the part of Lt. Moody, and, beyond mere speculation, Defendant has failed to show that the blank audio recording contained any exculpatory evidence. As in *Nance*, the trial court did not err when it declined to instruct the jury as requested by Defendant.

Conclusion

"Although defendant may not have received a perfect trial, we are confident, after a thorough review of his case, that he received a fair trial." *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992) (quotation marks omitted). As such, we find no error.

NO ERROR.

Judges DIETZ and TYSON concur.

STATE v. MYLETT

[262 N.C. App. 661 (2018)]

STATE OF NORTH CAROLINA
v.
PATRICK MYLETT

No. COA17-480

Filed 4 December 2018

1. Constitutional Law—First Amendment—jury harassment statute—nonexpressive conduct

North Carolina's jury harassment statute, N.C.G.S. § 14-225.2(a)(2), did not trigger First Amendment protections where it restricted nonexpressive conduct that is otherwise proscribable criminal conduct, because the statute prohibited threats and intimidation directed at a juror irrespective of the content. Even assuming the statute implicated the First Amendment, its restrictions were content-neutral and narrowly tailored to serve the significant governmental interest of ensuring that jurors remain free from threats and intimidation, thereby surviving intermediate scrutiny.

2. Constitutional Law—jury harassment statute—vagueness challenge—notice of proscribed conduct

North Carolina's jury harassment statute, N.C.G.S. § 14-225.2(a)(2), was deemed not unconstitutionally vague because its prohibition against making threats or intimidating jurors was sufficiently specific to put individuals on notice of the proscribed conduct, following prior case law holding that the undefined word "intimidate" in another statute was not unconstitutionally vague.

3. Conspiracy—juror harassment—meeting of the minds—sufficiency of evidence

In a prosecution for conspiracy to commit juror harassment, the State presented evidence sufficient to be presented to the jury that defendant and two other individuals shared a mutual, implied understanding to harass jurors outside of a courtroom where all three exhibited parallel, contemporaneous behavior such as pacing in the hallway and physically confronting and directing loud accusations at multiple jurors.

4. Evidence—impeachment evidence—social media post—exclusion

In a juror harassment case, defendant failed to show he was prejudiced by the trial court's decision to exclude a social media post defendant intended to use to impeach a juror-witness who

testified he suffered emotional distress after being harassed but which defendant failed to disclose during pretrial discovery. The Court of Appeals rejected defendant's unsupported argument that N.C.G.S. § 15A-905(a) did not apply to impeachment evidence.

5. Evidence—juror harassment trial—prior fight—hearsay analysis

In a prosecution for juror harassment, the trial court did not err by allowing juror-witnesses to testify regarding a fight involving defendant and his brother that resulted in his brother being tried for assault on a government official (the trial in which the juror-witnesses served on the jury), while excluding defendant's own testimony about that fight. None of the juror-witnesses' testimony constituted improper character evidence, nor hearsay, where it was offered to show their states of mind when defendant confronted them outside the courtroom after his brother's trial. By contrast, defendant's proffered testimony was inadmissible hearsay because he offered it to prove the truth of the matter asserted.

6. Criminal Law—jury instructions—request for definition—common usage and meaning

In a prosecution for juror harassment, the trial court was not required to define "intimidate" in instructions to the jury, because it is a word of common usage and meaning that can be reasonably construed and unlikely to confuse a jury.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 2 February 2017 by Judge Marvin P. Pope, Jr. in Watauga County Superior Court. Heard in the Court of Appeals 24 October 2017.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak, Deputy Solicitor General James W. Doggett, and Deputy Solicitor General Ryan Park, for the State.

Goodman Carr, PLLC, by Rob Heroy, for defendant-appellant.

CALABRIA, Judge.

Patrick Mylett ("defendant") appeals from the trial court's judgment entered upon a jury verdict finding him guilty of conspiracy to commit harassment of a juror pursuant to N.C. Gen. Stat. § 14-225.2(a)(2) (2017).

After careful review, we conclude that defendant received a fair trial, free from error.

I. Background

In August 2015, defendant and his twin brother ("Dan") were enrolled as students at Appalachian State University in Boone, North Carolina. On 29 August 2015, the brothers were involved in a fight at a fraternity party. Dan was subsequently charged with assault on a government official and intoxicated and disruptive behavior. On 31 March 2016, a Watauga County Superior Court jury returned a verdict finding Dan guilty of assault on a government official. After sentencing, defendant, Dan, and Dan's girlfriend ("Kathryn") loudly confronted six jurors about the verdict as they exited the courtroom and retrieved their belongings from the jury room. One juror reported the incident to the courthouse law enforcement officer, while another juror discussed the matter with the assistant district attorney.

On 19 April 2016, defendant was arrested and charged with six counts of harassment of a juror and one count of conspiracy to commit harassment of a juror. On 18 July 2016, the Watauga County grand jury returned bills of indictment formally charging defendant with these offenses. Dan and Kathryn were also separately charged and tried for the same offenses.

Defendant's trial commenced during the 30 January 2017 criminal session of Watauga County Superior Court with a hearing on several pretrial motions. Defendant filed pretrial motions to dismiss all charges as unconstitutional, arguing that the juror-harassment statute, N.C. Gen. Stat. § 14-225.2(a)(2), (1) violates the First Amendment, both on its face and as applied to his conduct; and (2) is unconstitutionally vague. Defendant also filed a pretrial motion *in limine*, pursuant to N.C. Rules of Evidence 404(b) and 802, requesting the trial court to order the State's "witnesses not to make any references to a fight or fights in which [defendant] or [Dan] participated." The trial court denied each of defendant's motions, but stated that the ruling on his motion *in limine* was "subject to being reopened based on the form of the question that is asked" at trial.

At trial, all six jurors testified as witnesses for the State. Following the State's presentation of evidence, defendant renewed his pretrial motions for dismissal and further moved to dismiss all charges for insufficient evidence. After the trial court denied his motions, defendant presented evidence, including his own testimony, and subsequently renewed his motions for dismissal at the close of all evidence.

At the charge conference, defendant requested that the trial court provide the jury with a definition of "intimidate," which is not defined by statute. *See* N.C. Gen. Stat. § 14-225.2. The State opposed defendant's motion, along with his proposed definitions. The trial court denied defendant's motion, and the jury was not provided with a definition of "intimidate."

On 2 February 2017, the jury returned verdicts finding defendant not guilty of six counts of juror harassment, but guilty of one count of conspiracy to commit juror harassment. The trial court sentenced defendant to 45 days in the custody of the Watauga County Sheriff, suspended his active sentence, and placed defendant on 18 months of supervised probation. The trial court also ordered defendant to serve 60 hours of community service, enroll in anger management, and obtain 20 hours of weekly employment.

Defendant appeals.

II. Constitutionality

[1] On appeal, defendant argues that the trial court erred by denying his motions to dismiss on the basis of the constitutionality of the juror-harassment statute. Specifically, he asserts that N.C. Gen. Stat. § 14-225.2(a)(2) violates his First Amendment right to free speech and expression; and (2) is void for vagueness. We disagree.

A. Standard of Review

Constitutional challenges to statutes are reviewed *de novo* on appeal. *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016). Yet, even under *de novo* review, we begin with a presumption of validity. *Id.* "This Court presumes that statutes passed by the General Assembly are constitutional, and duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt[.]" *Id.* (citations omitted); *see also Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991) ("Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter.").

B. Implication of the First Amendment

In First Amendment challenges, the initial determination our Court must make is whether the statute in question—N.C. Gen. Stat. § 14-225.2(a)(2) in the instant case—triggers First Amendment protections. *See State v. Bishop*, 368 N.C. 869, 872, 787 S.E.2d 814, 817 (2016).

To do so, we must determine whether N.C. Gen. Stat. § 14-225.2(a)(2) "restricts protected speech or expressive conduct, or whether the statute affects only nonexpressive conduct." *Id.* at 872, 787 S.E.2d at 817. While a seemingly simple task, this inquiry is not always straightforward or clear cut. The United States Supreme Court has long sought to balance the protection of expressive conduct—particularly when such conduct is "inherently" expressive—with the exclusion of otherwise proscribable criminal conduct that just so happens to involve written or spoken words. *Compare Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 164 L. Ed. 2d 156, 175 (2006) (extending First Amendment protection "only to conduct that is inherently expressive"), *with United States v. Alvarez*, 567 U.S. 709, 716, 183 L. Ed. 2d 574, 587 (2012) (plurality opinion) (noting that "speech integral to criminal conduct" remains a category of historically unprotected speech).

Recently, in *Bishop*, the North Carolina Supreme Court examined the First Amendment implications arising from our cyberbullying statute. 368 N.C. 869, 787 S.E.2d 814. The statute in question, N.C. Gen. Stat. § 14-458.1(a)(1), prohibited individuals from "[p]ost[ing] or encourage[ing] others to post on the Internet [any] private, personal, or sexual information pertaining to a minor" "[w]ith the intent to intimidate or torment a minor." N.C. Gen. Stat. § 14-458.1(a)(1)(d) (2015). The Court, in holding the statute applied to expressive conduct and therefore implicated the First Amendment, reasoned the "statute outlawed posting particular subject matter, on the internet, with certain intent[,]" and consequently "appl[ied] to speech and not solely, or even predominantly, to nonexpressive conduct." *Bishop*, 368 N.C. at 873, 787 S.E.2d at 817. The Court ultimately held the statute unconstitutional on the basis of its violation of "the First Amendment's guarantee of the freedom of speech." *Id.* at 880, 787 S.E.2d at 822.

In the instant case, N.C. Gen. Stat. § 14-225.2(a)(2) applies to nonexpressive conduct and does not implicate the First Amendment. N.C. Gen. Stat. § 14-225.2 provides, in part:

> (a) A person is guilty of harassment of a juror if he:
>
> (1) With intent to influence the official action of another as a juror, harasses, intimidates, or communicates with the juror or his spouse; or
>
> (2) *As a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse.*

N.C. Gen. Stat. § 14-225.2(a) (emphasis added). When read in context, it is apparent this language applies to a defendant's conduct—threats and intimidations—directed at a particular class of persons—jurors—irrespective of the content. Unlike the language found in *Bishop*, which was a content-based restriction on internet posts, the language in this statute amounts to a restriction on conduct that is otherwise proscribable as criminal. *See, e.g.*, *State v. Camp*, 59 N.C. App. 38, 42-43, 295 S.E.2d 766, 768-69 (1982) (holding a statute barring the use of a telephone to harass another individual does not implicate the First Amendment because the statute proscribed conduct not speech); *see also State v. Mazur*, __ N.C. App. __, 817 S.E.2d 919 (2018) (unpublished) (upholding the constitutionality of N.C. Gen. Stat. § 14-277.3A—North Carolina's stalking statute—because the statute did not implicate the First Amendment). Accordingly, we hold N.C. Gen. Stat. § 14-225.2(a)(2) proscribes conduct, not speech, and therefore does not implicate the First Amendment. We therefore overrule Defendant's argument.

C. Content-Neutral Restriction

However, even assuming *arguendo* N.C. Gen. Stat. § 14-225.2(a)(2) does implicate the First Amendment, the statute satisfies constitutional requisites.

The second threshold inquiry when examining the First Amendment validity of a statute is whether the portion of the statute limiting speech is "content based or content neutral." *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818. The outcome of this determination governs the appropriate standard of scrutiny we must apply. If a statute is found to be content based, we apply strict scrutiny under which the restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, __ U.S. __, __, 192 L. Ed. 2d 236, 245 (2015). If, however, we find the restrictions to be content neutral, we apply the less demanding intermediate scrutiny. *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818. Under intermediate scrutiny, the State must prove that the statute is "narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for communication of the information." *McCullen v. Coakley*, __ U.S. __, __, 189 L. Ed. 2d 502, 507 (2014) (citation and quotation marks omitted).

The United States Supreme Court in *Reed* explained that

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense

> meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by a particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.
>
> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys. Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Reed, __ U.S. at __, 192 L. Ed. 2d at 245 (citations and internal quotation marks omitted). As the North Carolina Supreme Court held, "[t]his determination can find support in the plain text of a statute, or the animating impulse behind it, or the lack of any plausible explanation besides distaste for the subject matter or message." *Bishop*, 368 N.C. at 875, 787 S.E.2d at 819. "Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." *Reed*, __ U.S. at __, 192 L. Ed. 2d at 247.

In the instant case, it is clear that the jury-harassment statute is content neutral, both on its face and by its purpose and justification. Taking each in turn, nothing on the face of the statute indicates the law applies to certain speech "because of the topic discussed or the idea or message expressed." *Id.* at __, 192 L. Ed. 2d at 245; *see also Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (holding that South Carolina's anti-robocall statute was content-based on its face because it applied "to calls with a consumer or political message but [did] not reach calls made for any other purpose"). The statute here does not limit itself to any particular topic or idea. Rather, it applies equally to any idea if the idea is expressed in a manner that intimidates or threatens the specified jurors. The statute may also be justified without reference to the content of the regulated speech because the statute focuses on the form or manner of

the expression, not the ideas sought to be expressed. The statute does not prohibit a defendant from engaging in expressing his dissatisfaction with a jury or juror's particular vote even directly to the jurors; instead, it prohibits a defendant from expressing his or her message in a particular manner that threatens or intimidates the jurors. Therefore, assuming the statute does implicate the First Amendment, it amounts to a content-neutral restriction. The standard of scrutiny required to withstand a constitutional challenge is intermediate scrutiny.

D. The Statute Survives Intermediate Scrutiny

As discussed above, intermediate scrutiny requires that the statute in question be "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 798, 105 L. Ed. 2d 661, 678, 680 (1989) (internal quotation marks omitted) (reaffirming that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so"). The United States Supreme Court explained in *Ward* that "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799, 105 L. Ed. 2d at 680 (citation and internal quotation marks omitted). The Court went on to note that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800, 105 L. Ed. 2d at 681.

It is undeniable that the State has a substantial interest in protecting the sanctity of the constitutional right to a trial by jury through ensuring that jurors remain free from threats and intimidation directly resulting from their duty to serve. The statute's proscriptions apply only to the manner in which a defendant seeks to express their message—*i.e.*, the statute prohibits a defendant from engaging in expression only in so far as it intimidates or threatens those jurors specified under the statute. Nothing in the statute, or its application to defendant, suggests the regulation results in "a substantial portion of the burden on speech . . . not serv[ing] to advance [the statute's] goals." *Id.* at 799, 105 L. Ed. 2d at 681. Accordingly, even assuming N.C. Gen. Stat. § 14-225.2(a)(2) implicates the First Amendment, the statute is narrowly tailored to serve the significant governmental interest of ensuring that jurors remain free from threats and intimidation. We therefore reject Defendant's arguments.

E. Void for Vagueness

[2] Defendant next argues that the term "intimidate" renders N.C. Gen. Stat. § 14-225.2(a)(2) void for vagueness because the statute "fails to provide . . . sufficient notice as to what constitutes intimidation [and] leaves open whether Defendant intentionally intimidated the juror, or merely whether a juror felt intimidated." We disagree.

A statute is unconstitutionally vague if it either "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969) (citation and quotation marks omitted), *aff'd sub nom.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971). Yet, the Constitution does not impose "impossible standards of statutory clarity[.]" *Id.* So long as the statute provides fair notice of "the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly," constitutional requirements are satisfied. *Id.*

This Court has previously held that the word "intimidate" is *not* unconstitutionally vague. *See State v. Hines*, 122 N.C. App. 545, 552, 471 S.E.2d 109, 114 (1996), *disc. review improvidently allowed*, 345 N.C. 627, 481 S.E.2d 85 (1997). In *Hines*, we upheld the constitutionality of N.C. Gen. Stat. § 163-275(11), which makes it unlawful "to intimidate or attempt to intimidate" election officers in the discharge of their official duties. 122 N.C. App. at 552, 471 S.E.2d at 114. As here, that statute failed to define "intimidate." *Id.* However, this Court applied the well-established principle of statutory construction that undefined terms "should be given their plain meaning if it is reasonable to do so[,]" and defined "intimidate" as is "commonly defined as 'to make timid or fearful: inspire or affect with fear: frighten.' " *Id.* (quoting Websters Third New International Dictionary (1968)). Thus, this Court concluded that by enacting N.C. Gen. Stat. § 163-275(11), "the legislature intended to prohibit anyone from frightening an individual while conducting election duties." *Id.*

Here, as in *Hines*, "the statute is specific enough to warn individuals of common intelligence of the conduct which is proscribed and is certainly capable of uniform judicial interpretation." *Id.* Therefore, we conclude that the undefined term "intimidate" does not render N.C. Gen. Stat. § 14-225.2(a)(2) void for vagueness and overrule Defendant's constitutional challenges.

III. Sufficiency of the Evidence

[3] Defendant next argues that the trial court erred by denying his motion to dismiss the conspiracy charge because the State presented insufficient evidence that defendant, Dan, and Kathryn reached "a meeting of the minds or an agreement to intimidate the jury." We disagree.

In reviewing a criminal defendant's motion to dismiss, the question for the trial court "is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "[T]he trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

"The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

> If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

Id. (citation and quotation marks omitted). We review the trial court's denial of a criminal defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner." *State v. Winkler*, 368 N.C. 572, 575, 780 S.E.2d 824, 826-27 (2015) (citation and quotation marks omitted). Conspiracy may be proven through direct or circumstantial evidence. *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). The

offense is generally "established by a number of indefinite acts, each of which, standing alone, might have little weight, but taken collectively, they point unerringly to the existence of a conspiracy." *Id.* (citation and quotation marks omitted).

"In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice." *Winkler*, 368 N.C. at 575, 780 S.E.2d at 827 (citation and quotation marks omitted). "Nor is it necessary that the unlawful act be completed." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991). "Indeed, *the conspiracy* is the crime and not its execution." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933) (emphasis added). Consequently, "no overt act is necessary to complete the crime of conspiracy." *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (citation omitted). Rather, the offense

> is complete upon "a meeting of the minds," when the parties to the conspiracy (1) give sufficient thought to the matter, however briefly or even impulsively, to be able mentally to appreciate or articulate the object of the conspiracy, the objective to be achieved or the act to be committed, and (2) whether informed by words or by gesture, understand that another person also achieves that conceptualization and agrees to cooperate in the achievement of that objective or the commission of the act.

State v. Sanders, 208 N.C. App. 142, 146, 701 S.E.2d 380, 383 (2010) (citations omitted). "Once a conspiracy has been shown to exist, the acts of a co-conspirator done in furtherance of a common, illegal design are admissible in evidence against all." *Morgan*, 329 N.C. at 658, 406 S.E.2d at 835.

In the instant case, the State presented substantial evidence that defendant, Dan, and Kathryn shared a "mutual, implied understanding" to commit juror harassment. *Winkler*, 368 N.C. at 575, 780 S.E.2d at 827 (citation and quotation marks omitted). During the sentencing hearing, defendant tensely paced in the hallway outside the courtroom. Defendant confronted each of the six remaining jurors about the verdict as they exited the courtroom after sentencing. More importantly, defendant's voice grew louder, and his tone more "threatening," as he became increasingly agitated with each confrontation.

Dan and Kathryn mirrored defendant's behavior when they joined him in the hallway. According to juror Kinney Baughman's testimony, when he exited the courtroom, "the whole Mylett family . . . w[as]

out there pacing, obviously upset[.]" After Baughman retrieved his belongings from the jury room, defendant "immediately engaged" him. Defendant told Baughman that he "had done wrong, that his brother was an innocent man[.]" Baughman attempted to walk away from the group, but quickly realized that he was walking in the wrong direction. When Baughman turned around, Kathryn "immediately . . . pounced" on him, "pointing fingers" in Baughman's face while "screaming and yelling" similar accusations to those made by defendant.

"Ordinarily, the existence of a conspiracy is a jury question, and where reasonable minds could conclude that a meeting of the minds exists, the trial court does not err in denying a motion to dismiss for insufficiency of the evidence." *Sanders*, 208 N.C. App. at 146, 701 S.E.2d at 383 (citation and quotation marks omitted). The parallel behavior exhibited by defendant, Dan, and Kathryn as they confronted the jurors is evidence that the parties mutually understood "the objective to be achieved" and implicitly agreed "to cooperate in the achievement of that objective or the commission of the act." *Id.* This evidence was sufficient to send the conspiracy charge to the jury.

Defendant also contends that the State presented insufficient evidence that he intended "to threaten or menace any juror." However, this argument challenges the denial of his motion to dismiss the charges of juror harassment, not conspiracy to commit that offense. As explained above, the law distinguishes "between the offense to be committed and *the conspiracy* to commit the offense." *Whiteside*, 204 N.C. at 712, 169 S.E. at 712 (emphasis added). Since the jury found defendant not guilty of all six counts of juror harassment, defendant is unable to show that, absent the alleged error, "a different result would have been reached at trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2017); *see also State v. Stanley*, 110 N.C. App. 87, 90, 429 S.E.2d 349, 350 (1993) (declining to address the defendant's challenge to the trial court's denial of his motion to dismiss where the "defendant was not convicted of first degree murder or otherwise prejudiced by the court's refusal to dismiss the charge"). Therefore, defendant's argument is moot, and we will not address it. *See State v. Marshall*, 304 N.C. 167, 168-69, 282 S.E.2d 422, 423 (1981) ("Since the jury at th[e sentencing] phase returned a verdict favorable to defendant, the questions which he attempts to raise are moot and will not be decided.").

IV. Evidentiary Challenges

Defendant next asserts several challenges to the trial court's evidentiary rulings. Specifically, he argues that the trial court erroneously (1)

excluded a Facebook post proffered by defendant to impeach a juror-witness and (2) admitted the juror-witnesses' testimony about the fraternity party fight underlying Dan's trial, while excluding defendant's testimony about the same issue. We disagree.

A. Standard of Review

As a general rule, "[e]videntiary errors are harmless unless a defendant proves that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307, 549 S.E.2d 889, 893, *disc. review denied*, 354 N.C. 223, 554 S.E.2d 650 (2001). However, "[w]hen preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011).

B. Facebook Post

[4] During cross-examination, defendant attempted to introduce juror Kinney Baughman's Facebook post from 2 April 2016, in which Baughman shared an OpenCulture.com post describing a technique for opening a wine bottle with a shoe. Defendant proffered this evidence to impeach Baughman's testimony about his emotional distress resulting from the confrontation following Dan's trial. However, the State objected on the grounds that defendant failed to disclose it during pretrial discovery, as required by N.C. Gen. Stat. § 15A-905(a), and the trial court excluded the post.

N.C. Gen. Stat. § 15A-905 governs a criminal defendant's pretrial discovery obligations in superior court proceedings. Upon the State's motion, the trial court must

> order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

N.C. Gen. Stat. § 15A-905(a) (2017).

On appeal, defendant contends that the trial court erroneously excluded Baughman's Facebook post because N.C. Gen. Stat. § 15A-905(a) does not apply to impeachment evidence. Defendant offers no case law supporting this argument, and our research yields none. However, even assuming, *arguendo*, that the trial court erred by

excluding this evidence, defendant fails to explain how "absent the error a different result would have been reached at trial." *Ferguson*, 145 N.C. App. at 307, 549 S.E.2d at 893. Since defendant fails to meet his burden of showing prejudice, this argument is overruled.

C. Fraternity-Party Fight

[5] Defendant next argues that the trial court erred by permitting the juror-witnesses to testify, over objection, about the fraternity-party fight underlying Dan's trial, while excluding defendant's testimony about the same events. Specifically, defendant contends that the jurors' testimony was improper character evidence and inadmissible hearsay. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant subject to but *one exception*[.]" *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). Under Rule 404(b), such evidence must be excluded "if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.*

Contrary to defendant's arguments at trial and on appeal, evidence of the fraternity-party fight was not introduced for any improper purpose under Rule 404(b). As the trial court recognized in ruling on defendant's motion *in limine*, it would have been nearly impossible to exclude all evidence of the fight underlying Dan's trial. Indeed, this precipitating event "forms part of the history" of defendant's interaction with the juror-witnesses. *State v. Agee*, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990) (citation and quotation marks omitted).

Similarly, the jurors' testimony on this issue was not hearsay. "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). To the limited extent that the jurors even testified about the fight, they did not recount out-of-court statements from Dan's trial, nor was the evidence offered to prove the truth of the matter asserted. Instead, the testimony was offered for the legitimate, non-hearsay purpose of proving the jurors' states of mind:

> [THE STATE]: And what did you hear or see [defendant] do?
>
> [ROSE NELSON]: Well, he asked me what if—or he said that he hoped that I could live with myself because I had convicted an innocent man, and then as I was making my

way to the stairs trying to get down the stairs, he was saying something about the crooked Boone police, and he hoped that I slept well.

Q. How would you describe the tone of voice he used?

A. To me it was very threatening.

Q. Why do you say that?

A. I guess because of being in the courtroom for the days that I was in the courtroom and listening to what the two young men had done prior to that.

. . .

Q. And you mentioned—what are you referring to when you say what you heard the two young men do prior to that?

A. I just felt like there was a lot of violence displayed and the whole reason that they were at, you know, in the situation that they were in and their whole demeanor during the whole trial.

Q. How would you describe [defendant]'s demeanor during the trial?

A. Very agitated.

. . .

Q. After these comments were made to you did you have any sort of physical reaction to it?

A. I did. I left the courtroom, went straight to my husband's work and I was literally shaking, cause I was nervous. I had never done that before and the fact of the matter that the gentlemen knew what I was driving, where I worked and just very—it just was unnerving to me to know that they had that kind of anger in them and that they could possibly retaliate towards me.

Defendant contends that the trial court denied him an opportunity to testify about the fight and thus to rebut the implication that he committed an act of violence. However, unlike the jurors' testimony, the evidence that defendant sought to introduce was inadmissible hearsay:

> [DEFENSE COUNSEL]: How were you feeling emotionally?
>
> [DEFENDANT:] I was distraught, I was confused, I was sad, upset, just a overwhelming waterfall of different emotions just taking over.
>
> Q. Can you tell us why you felt that way?
>
> A. I was shocked with the outcome because they had admitted he was spitting out blood and the officer admitted he didn't try to spit on him but I guess—
>
> [THE STATE]: Objection.
>
> THE COURT: Sustained.

(Emphasis added).

Unlike the jurors' testimony, defendant's statement that "the officer admitted he didn't try to spit on him" is inadmissible hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c). In his brief, defendant explains that he offered this evidence "to rebut the allegations and show that he and his brother were victims"—i.e. to prove the truth of the matter asserted. Accordingly, unlike the juror-witnesses' testimony on the matter, defendant's testimony regarding the fight was inadmissible hearsay. Therefore, the trial court properly admitted the former and excluded the latter.

V. Jury Instructions

[6] Defendant's final argument is that the trial court erred by denying his request for a jury instruction on the definition of "intimidate." We disagree.

It is the duty of the trial court "to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). "Failure to instruct upon all substantive or material features of the crime charged is error." *Id.* However, "[i]t is not error for the court to fail to define and explain words of common usage and meaning to the general public." *S. Ry. Co. v. Jeffco Fibres, Inc.*, 41 N.C. App. 694, 700, 255 S.E.2d 749, 753, *disc. review denied*, 298 N.C. 299, 259 S.E.2d 302 (1979).

Since there is no specific pattern jury instruction for N.C. Gen. Stat. § 14-225.2(a)(2), the State submitted a proposed special jury instruction. At the charge conference, defendant contended that the State's proposed instruction was "vague" and would therefore "make it tough for the jury" unless the trial court also provided a definition of the term "intimidate." Defendant submitted two proposed definitions, which

would have required the State to prove either: (1) that the defendant means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals; or (2) that the defendant menaced and made coercive statements to the juror, or otherwise threatened in an especially malignant or hostile manner, and that he intended to do so. The State opposed defendant's proposed definitions as unnecessary and contrary to law, and the trial court denied his request.

Defendant contends that the trial court's failure to provide a "legally sufficient" definition of "intimidate" likely confused the jury. However, as explained above, "intimidate" is a word of common usage that may be reasonably construed according to its plain meaning. *Hines*, 122 N.C. App. at 552, 471 S.E.2d at 114 ("Undefined words in a statute should be given their plain meaning if it is reasonable to do so."). Since "intimidate" has a common meaning amongst the general public, the trial court was not required to define the term for the jury. *See S. Ry. Co.*, 41 N.C. App. at 700, 255 S.E.2d at 753-54 (determining that "by reason of," "arising out of," and "incidental to" are "phrases of common usage" that required no "specific definition and explanation" where "the meaning of the terms as were used in the jury instructions was clear and should have been understood by the jury"); *State v. Geer*, 23 N.C. App. 694, 696, 209 S.E.2d 501, 503 (1974) (concluding that the trial court did not err by failing to define "flight" in its instructions to the jury, where the word "was being used in its common, everyday sense").

VI. Conclusion

N.C. Gen. Stat. § 14-225.2(a)(2) prohibits nonexpressive conduct, unprotected speech. The statute provides fair notice of the conduct it condemns—threatening or intimidating former jurors as a result of their service—and does not allow for arbitrary enforcement. Accordingly, N.C. Gen. Stat. § 14-225.2(a)(2) is neither unconstitutionally overbroad nor void for vagueness. Furthermore, the State presented sufficient evidence from which a reasonable juror could conclude that defendant, Dan, and Kathryn conspired to commit juror harassment. Therefore, the trial court did not err by denying defendant's motions to dismiss.

Even if the trial court erred in excluding the Facebook post proffered to impeach a juror-witness, defendant fails to establish prejudice. The jurors' testimony regarding the fraternity-party fight was neither improper character evidence nor inadmissible hearsay, while defendant's testimony on the matter was properly excluded as hearsay. Finally, the trial court did not err by failing to define "intimidate" for the jury because the term is one of common usage and meaning.

NO ERROR.

Judge ZACHARY concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, dissenting.

I. First Amendment[1]

I believe N.C. Gen. Stat. § 14-225.2(a)(2) (2017) ("N.C.G.S. § 14-225.2(a)(2)" or "the statute") is unconstitutional on its face and as applied to Defendant. The relevant language of the statute states: "A person is guilty of harassment of a juror if he: . . . . As a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse." N.C.G.S. § 14-225.2(a)(2). For simplicity, I will refer to "former jurors" as referenced in N.C.G.S. § 14-225.2(a)(2) as "jurors."

As the majority opinion recognizes, when considering a First Amendment challenge, "[w]e must first determine whether [the challenged statute] restricts protected speech or expressive conduct, or whether the statute affects only nonexpressive conduct. Answering this question determines whether the First Amendment is implicated." *State v. Bishop*, 368 N.C. 869, 872, 787 S.E.2d 814, 817 (2016).[2]

A. *Is the First Amendment Implicated*

I first note that, though the State may have argued this "threshold" issue at trial, on appeal the State seems to concede that the statute *does* implicate the First Amendment, as it does not argue this issue in its brief—its arguments are limited to contentions that the statute survives First Amendment analysis pursuant to either intermediate scrutiny or strict scrutiny. I disagree with the majority opinion's holding that "[w]hen read in context, it is apparent [the statute's language] applies to a defendant's *conduct*—threats and intimidation—directed at a particular class of persons—jurors—*irrespective of the content*[,]" and "not speech."

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1. Much of the analysis in earlier sections of my dissent will also be relevant to later sections.

2. In line with the majority opinion, I will also use "speech" or "protected speech" to refer to both "protected speech" and "expressive conduct." In addition, although Defendant was only convicted on the conspiracy charge, because his intent to violate N.C.G.S. § 14-225.2(a)(2) is an element of that charge, it is appropriate to consider the constitutionality of the statute as argued by Defendant.

(Emphasis added). It is, in part, precisely because the statute proscribes conduct "irrespective of the content" of that conduct that it implicates the First Amendment. " 'A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.' " *Texas v. Johnson*, 491 U.S. 397, 406, 105 L. Ed. 2d 342, 355 (1989) (citation omitted). "The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716, 147 L. Ed. 2d 597, 611 (2000).

The fact that the *express language* of the relevant part of N.C.G.S. § 14-225.2(a)(2) proscribes "threatening" or "intimidating" a juror is not sufficient to support a holding that the statute does not implicate the First Amendment. The United States Supreme Court in *Cohen v. California*, for example, held a California statute that "prohibit[ed] 'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct' " violated the defendant's First Amendment rights. *Cohen v. California*, 403 U.S. 15, 16, 29 L. Ed. 2d 284, 288 (1971) (citation omitted). The express language of the statute in *Cohen* prohibited "offensive conduct." The express language of N.C.G.S. § 14-225.2(a)(2) prohibits "threats" or "intimidation." All three of these terms, on their face, can be defined as "conduct." However, the Court in *Cohen* held—despite the fact that the express language of the California statute was limited to "conduct"—that statute in reality restricted protected speech, because of the *type* of conduct that *could* be subject to prosecution pursuant to its terms. The defendant in *Cohen* was convicted of "disturbing the peace" through "offensive conduct" for wearing a jacket adorned with the words "F_ck the Draft." *Id.* at 16, 29 L. Ed. 2d at 288-89 (citation omitted). The Court recognized that, according to longstanding precedent, certain kinds of speech are not protected by the First Amendment because of the inherent dangers involved when those kinds of speech are used. *Id.* at 19–20, 29 L. Ed. 2d at 290-91 ("[T]his case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case." The Court also held that the defendant's conduct did not fall within the "fighting words" exception to First Amendment protections.).

The Court in *Cohen* held: "[The defendant's] conviction . . . rests squarely upon his exercise of the 'freedom of speech' protected from

arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom[.]" *Id.* at 19, 29 L. Ed. 2d at 290. Because the defendant's alleged offensive *conduct* in *Cohen* was an act of protected speech, it did not matter that some *other* type of conduct might constitute "offensive conduct" that *could* be prosecuted without violating the First Amendment. *Id.* at 26, 29 L. Ed. 2d at 294-95 ("[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. *Because that is the only arguably sustainable rationale for the conviction here at issue*, the judgment below must be reversed.").

In the present case, although the statute proscribes the following relevant "conduct:" "threaten[ing] in any manner or in any place, or intimidat[ing] [a] former juror" "[a]s a result of the prior official action of [the former] juror[,]" N.C.G.S. § 14-225.2(a)(2), the only "sustainable rationale for the conviction" was Defendant's "speech"—his verbal communication of his opinion to the jurors that their verdict constituted an injustice to his brother. The verdict of a jury convicting a defendant is unquestionably as much an act of the State as the indictment of that defendant, and a citizen's right to publicly criticize a jury's verdict is protected by the First Amendment.

Therefore, the conduct proscribed by N.C.G.S. § 14-225.2(a)(2) implicates protected speech unless it is covered by some previously recognized exception to First Amendment protections. *Virginia v. Black*, 538 U.S. 343, 358, 155 L. Ed. 2d 535, 551 (2003) ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572, 86 L. Ed. 1031 (1942) ('There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem')."). The previously recognized exception most relevant to our analysis of N.C.G.S. § 14-225.2(a)(2) is the "true threat" exception. *See Id.* at 359, 155 L. Ed.2d at 552 (citations omitted) ("the First Amendment also permits a State to ban a 'true threat' ").

The Fifth Circuit recently held a statute that does not explicitly limit the term "threat" to "true threats" cannot be construed in a manner that does not implicate the First Amendment:

> [Section 14:122 of the] statute criminalizes "public intimidation," defined as "the use of violence, force, or *threats*

upon [a specified list of persons, including any public officer or public employee] with the intent to influence his conduct in relation to his position, employment, or duty." (Emphasis added.) On its face, the statute is extremely broad. The definition of "threat" generally encompasses any "statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done." That definition easily covers threats to call your lawyer if the police unlawfully search your house or to complain to a DMV manager if your paperwork is processed wrongly.

. . . .

According to the state, we should construe the statute to apply only to true threats, i.e. "a serious expression of an intent to commit an act of unlawful violence" toward specific persons. There are several reasons why we cannot do so. First, the definition of "threat" is broader than true threats: any "statement of an intention to inflict pain, injury, *damage*, or *other hostile action* on someone in retribution for something done or not done." [(citing "Oxford Dictionaries (Online ed.)") (emphasis added by Fifth Circuit).] . . . .

Finally, Louisiana's reliance on its caselaw proves to be a double-edged sword. As plaintiffs note, the Louisiana Court of Appeals has upheld the conviction of a defendant who violated Section 14:122 by threatening "to sue" an officer and "get [his] job" if the officer arrested him. Plainly, such a threat suggests no violence—indeed, the threat appears to be a plan to take perfectly lawful actions. Accordingly, we cannot construe Section 14:122 to apply only to true threats of violence.

It follows that, properly understood, Section 14:122 applies to any threat meant to influence a public official or employee, in the course of his duties, to obtain something the speaker is not entitled to as a matter of right. But so construed, the statute reaches both true threats—such as "don't arrest me or I'll hit you"—and threats to take wholly lawful actions—such as "don't arrest me or I'll sue you." In both those examples, the speaker may be legally subject to arrest and is trying to influence a police officer in

> the course of his duties. Thus, Section 14:122 makes both threats a criminal act.

Seals v. McBee, 898 F.3d 587, 593–95 (5th Cir. 2018) (citations and footnotes omitted).

Our Supreme Court in *Bishop* implicitly recognized the necessity, as held in *Seals*, that any definition of "intimidate" in the criminal stature before it would have to rise to the level of a "true threat" in order to survive First Amendment analysis. The Court rejected the State's argument that, in order to render the statute involved constitutional, the Court itself should "define 'to intimidate' as 'to make timid; fill with fear[,]' " because "intimidate" had not been defined by statute or case law *for that specific statute*. The Court reasoned:

> While we need not, and do not, address a hypothetical statute limited to proscribing unprotected "true threats"—which the United States Supreme Court has defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"—*we do note that such a statute might present a closer constitutional question. Cf. Elonis v. United States*, ("reversing the defendant's conviction under a federal statute that made 'it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another" ' and for that reason, seeing no need to consider related First Amendment concerns").

Bishop, 368 N.C. at 878 n.3, 787 S.E.2d at 821 n.3 (citations omitted) (emphasis added). N.C.G.S. § 14-225.2(a)(2) suffers from this same constitutional deficiency.

N.C.G.S. § 14-225.2(a)(2) fails to define its key terms. Neither "threaten" nor "intimidate" is defined and, absent any clear definition of these terms by the General Assembly, or our appellate courts, we cannot construe the statute in a manner that prohibits only "true threats." The trial court's refusal, in the present case, to include in its jury instruction a definition of "intimidate" as limited to a "true threat," consistent with *Bishop* and *Black*, demonstrates this deficiency in the statute. In *Bishop*, concerning the relevant statute in that case, the Court stated why clear definitions are a requirement:

> Regarding motive, the statute prohibits anyone from posting forbidden content with the intent to "intimidate

> or torment" a minor. However, *neither "intimidate" nor "torment" is defined in the statute*, and the State itself contends that we should define "torment" broadly to reference conduct intended "to annoy, pester, or harass." The protection of minors' mental well-being may be a compelling governmental interest, but it is hardly clear that teenagers require protection via the criminal law from online annoyance.

Bishop, 368 N.C. at 878–79, 787 S.E.2d at 821 (emphasis added). The Court further underscored the necessity, for First Amendment purposes, of limiting terms such as "intimidate" to acts constituting "true threats." *Id.* at 878 n.3, 787 S.E.2d at 821 n.3. (had "intimidate" been defined in the relevant statute as limited to "true threats," "such a statute might [have] present[ed] a closer constitutional question").

Because the majority opinion holds that the statute only proscribes non-expressive conduct, it does not see any need to define "threaten" or "intimidate" in a manner that restricts those terms to actions that constitute "true threats." Because the State implicitly concedes that the statute implicates First Amendment protections, it—unlike in *Bishop*—does not even suggest any appropriate definitions for those terms.[3] Undefined, "threaten" and "intimidate" encompass a multitude of activities that do not constitute "true threats;" those that "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552; *Bishop*, 368 N.C. at 878 n.3, 787 S.E.2d at 821 n.3. Instead, the majority opinion's holding will allow prosecution for protesting government action based on jurors' claims that a defendant's actions made them

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3. The State does make one argument that the statute does not implicate the First Amendment, but solely based upon its contention that "the inside of a courthouse is a nonpublic forum, where the government has wide latitude to enforce reasonable speech restrictions." This argument fails: "[The defendant] was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where [the defendant] was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places." *Cohen*, 403 U.S. at 19, 29 L. Ed. 2d at 290 (citations omitted). N.C.G.S. § 14-225.2(a)(2) proscribes the "threatening" or "intimidating" conduct "in any manner or *in any place*," not just in courthouses. *Id.* (emphasis added). For example, nothing in the statute would have prevented Defendant from prosecution, based upon the identical conduct alleged in this case, if it had occurred in a public square or other location where "the government's ability to restrict speech is 'very limited.' " *McCullen v. Coakley*, 573 U.S. __, __, 189 L. Ed. 2d 502, 514 (2014); *see also Packingham v. North Carolina*, 582 U.S. __, 198 L. Ed. 2d 273 (2017).

feel "timid or fearful." *State v. Hines*, 122 N.C. App. 545, 552, 471 S.E.2d 109, 114 (1996) (citation omitted). As the United States Supreme Court has declared:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.*

Terminiello v. City of Chicago, 337 U.S. 1, 4, 93 L. Ed. 1131, 1134-35 (1949) (citations omitted). In order to be properly excluded from First Amendment protections, the definitions of "threaten" and "intimidate" must not fall below the "true threat" standard set forth by the United States Supreme Court:

> [T]he First Amendment . . . permits a State to ban a "true threat." *Watts v. United States*, 394 U.S. 705, 708 (1969); *accord*, *R.A.V. v. City of St. Paul*, [505 U.S. 377,] 388, ("[T]hreats of violence are outside the First Amendment"); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994); *Schenck v. Pro–Choice Network of Western N.Y.*, 519 U.S. 357, 373 (1997).
>
> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See Watts v. United States*, *supra*, at 708 ("political hyperbole" is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388. . . . . [A] prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Intimidation* in the *constitutionally proscribable sense of the word is*

> *a type of true threat*, where a speaker directs a threat to a person or group of persons with the *intent of placing the victim in fear of bodily harm or death.*

Black, 538 U.S. at 359-60, 155 L. Ed. 2d at 552 (citations omitted) (emphasis added); *see also Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1062 (9th Cir. 2002) (properly construing the relevant federal statute in the defendants' appeal "requires that we define 'threat of force' in a way that comports with the First Amendment [i.e. as a 'true threat'], and it raises the question whether the conduct that occurred here falls within the category of unprotected speech"). Precedent from the United States Supreme Court, cited with favor by our Supreme Court, makes clear that full First Amendment protections apply to statutes like N.C.G.S. § 14-225.2(a)(2) unless the relevant terms, such as "threaten" or "intimidate," have been defined as limited to "true threats." *Black*, 538 U.S. at 359-60, 155 L. Ed. 2d at 552; *Bishop*, 368 N.C. at 878–79, 787 S.E.2d at 820–21. Because the majority opinion does not require that the N.C.G.S. § 14-225.2(a)(2) terms "threaten" and "intimidate" be limited to "true threats" as defined by our Supreme Court and the United States Supreme Court, I would hold that the First Amendment is implicated.

B. *First Amendment Analysis*

1. Content Based or Content Neutral

Having concluded that the First Amendment is implicated, I conduct further First Amendment review. "[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641, 129 L. Ed. 2d 497, 516-17 (1994) (citations omitted). As noted by our Supreme Court, the correct level of scrutiny depends on the nature of the speech proscribed:

> Having concluded that [the statute at issue] limits speech, we now consider a second threshold inquiry: whether this portion of the [relevant] statute is content based or content neutral. This central inquiry determines the level of scrutiny we apply here. Content based speech regulations must satisfy strict scrutiny. Such restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." In contrast, content neutral measures—such as those governing only the time,

> manner, or place of First Amendment-protected expression—are subjected to a less demanding but still rigorous form of intermediate scrutiny. The government must prove that they are "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Bishop, 368 N.C. at 874–75, 787 S.E.2d at 818 (citations omitted). I would hold the statute is content based and, therefore, apply strict scrutiny. In the alternative, I would also hold the statute, as written and interpreted, fails intermediate scrutiny.

"A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert, Ariz.*, __ U.S. __, __, 192 L. Ed. 2d 236, 245 (2015); *see also Bishop*, 368 N.C. at 875–76, 787 S.E.2d at 819 ("strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based").

N.C.G.S. § 14-225.2(a)(2) states: "A person is guilty of harassment of a juror if he: . . . . *As a result of the prior official action of another as a juror* in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse." N.C.G.S. § 14-225.2(a)(2) (emphasis added). On its face, the statute criminalizes communication of any perceived threat to, or any form of intimidation of, a juror, by any person, based upon that person's reaction to a verdict, an indictment, or any other official action taken by the juror. In simpler terms, as long as some theory of threat or intimidation is alleged, the statute prohibits persons from expressing their discontent *in response to government action*—specifically the actions jurors perform for the State as required by N.C. Const. art. I, §§ 24-26 and our General Statutes. The fact that the State action in a trial is accomplished in part through our jury system does not diminish the governmental nature of that action.

In *Bishop*, our Supreme Court held:

> Here, it is clear that the cyberbullying statute is content based, on its face and by its plain text, because the statute "defin[es] regulated speech by [its] particular subject matter." The provision under which defendant was arrested and prosecuted prohibits "post[ing] or encourag[ing] others to post . . . private, personal, or sexual information pertaining to a minor." The statute criminalizes some messages but not others, and makes it impossible to determine

> whether the accused has committed a crime without examining the content of his communication.

Bishop, 368 N.C. at 876, 787 S.E.2d at 819. In the present case, N.C.G.S. § 14-225.2(a)(2) criminalizes some messages—dissatisfaction with the official acts of a juror—but not others—dissatisfaction with a juror's comments concerning the verdict, for example. Therefore, it is "impossible to determine whether the accused has [violated the statute] without examining the content of his communication." *Id*. In the present case, the State had to examine the content of Defendant's communications to the jurors in order to determine that those communications were in response to an official act—voting to convict Defendant's brother—and, also, in order to conclude that the communications constituted "threats" or "intimidation." Had the State determined, based upon what Defendant allegedly said to the jurors, that Defendant's actions were solely in response to some non-official act—*e.g.* a disparaging comment made by a juror concerning Defendant or his brother, no violation of the statute would have occurred. Likewise, had the State determined that, pursuant to the majority opinion's interpretation of the statute, Defendant's comments to the jurors could not have caused the jurors to feel "frightened" or "timid," it could not have charged Defendant. I would hold that strict scrutiny should apply. *Id*.

2. The Statute Fails Both Strict Scrutiny and Intermediate Scrutiny

However, I would also hold that the statute, as written and interpreted, fails even intermediate scrutiny and, therefore, violates the First Amendment. "Articulations of intermediate scrutiny vary depending on context, but tend to require an important or substantial government interest, a direct relationship between the regulation and the interest, and regulation no more restrictive than necessary to achieve that interest." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012) (citation omitted). In order to survive intermediate scrutiny review, "[t]he government must prove that [the restrictions on speech] are 'narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818 (citation omitted). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485, 101 L. Ed. 2d 420, 432 (1988) (citation omitted). I believe the statute fails to satisfy the requirements that must be met to pass intermediate scrutiny.

I recognize the important governmental interest in preventing juror harassment, but I also recognize the countervailing fundamental right to challenge governmental action in a nonviolent manner. "[T]he assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections.' " *Packingham v. North Carolina*, 582 U.S. __, __, 198 L. Ed. 2d 273, 281 (2017). As I discuss below with regard to Defendant's overbreadth analysis, the statute is extremely broad in scope—not "narrowly tailored." "A person is guilty of harassment of a juror if he: . . . . As a result of the prior official action of another as a juror in a grand jury proceeding or trial, threatens in any manner or in any place, or intimidates the former juror or his spouse." N.C.G.S. § 14-225.2(a)(2) (emphasis added). The statute is without any real limitation beyond its limitation on *the type of speech that is proscribed*. For example, the statute does not include any express limitations with respect to: time; place; persons who may commit the offence; what kind of "official action" is sufficient to trigger the statute; the method of making or communicating a threat; the intent to actually threaten, or how "threat" is defined or proven; the intent to actually intimidate, or how "intimidation" is defined or proven;[4] or the reasonableness of a juror's reaction to the alleged threat or intimidation. Nor does it clarify whether a juror's subjective feelings are relevant to the analysis.[5] I believe N.C.G.S. § 14-225.2(a)(2) is "more restrictive than necessary to achieve [the legitimate government] interest" involved. *Hest Techs.*, 366 N.C. at 298, 749 S.E.2d at 436 (citation omitted); *see also McCullen*, 573 U.S. at __, 189 L. Ed. 2d at 520 (citation omitted) (the statute cannot " 'regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals' ").

Further, it cannot be said with confidence that the statute " 'leave[s] open ample alternative channels for communication of the information[,]' " *Bishop*, 368 N.C. at 874–75, 787 S.E.2d at 818, because the statute, as interpreted in the majority opinion, makes almost any expression of dissatisfaction to a juror, based upon the juror's prior official actions, subject to prosecution. It is unclear how anyone who wanted to express dissatisfaction in response to a verdict—or other official action

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4. In the federal context, a defendant must *intend that his actions will be perceived* as a "true threat." *Elonis*, 575 U.S. at __, 192 L. Ed. 2d at 16-17. The State's position at trial was that *no* specific intent was required; that the issue for the jury was "not whether [D]efendant intended to threaten or intended to intimidate[,]" only whether the jurors "were indeed intimidated, or were indeed threatened[.]" The State informed the jury during its closing argument that no such intent was required.

5. In the present case, the State elicited lengthy testimony concerning alleged fears by the jurors that Defendant, Dan, or Kathryn might come to the jurors' houses to harm them.

rendered by a juror—could determine what methods of communication might be interpreted as "threatening" or "intimidating" under the statute. The statute could well have a significant chilling effect on such expression. For example, there is nothing in the statute as interpreted in the majority opinion that would prevent prosecution of a group of people who had gathered in a public space outside a courthouse to voice their dissatisfaction with a verdict in a high profile case. The mere public gathering of people angry with a verdict could be deemed "threatening" or "intimidating," no matter what anyone in the crowd verbally or physically communicated in the presence of the departing jurors. Based upon the majority opinion's holding, it is certain that a demonstrator shouting to departing jurors that the jurors had convicted an innocent person and should feel bad for having done so, *could* be prosecuted in North Carolina. *See Black*, 538 U.S. at 365, 155 L. Ed. 2d at 555-56 (citations and quotation marks omitted) ("It is apparent that the provision as so interpreted would create an unacceptable risk of the suppression of ideas. . . . . As interpreted . . ., the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect."). Further, the State may not rely on prosecutorial discretion in order to save an otherwise unconstitutional statute:

> Not to worry, the Government says: The Executive Branch construes § 48 to reach only "extreme" cruelty, and it "neither has brought nor will bring a prosecution for anything less." The Government hits this theme hard, invoking its prosecutorial discretion several times. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.

United States v. Stevens, 559 U.S. 460, 480, 176 L. Ed. 2d 435, 451 (2010) (citations omitted). I do not believe the statute survives intermediate scrutiny. A "true threat" requirement could likely save the statute in this regard, but the majority opinion holds there is no such requirement.

However, because I believe strict scrutiny is actually the appropriate standard for this case, I would hold that the restrictions on speech in the statute "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818 (citations omitted). "The State must show not only that a challenged content based

measure addresses the identified harm, but that the enactment provides 'the least restrictive means' of doing so. Given this 'exacting scrutiny,' it is perhaps unsurprising that few content based restrictions have survived this inquiry." *Bishop*, 368 N.C. at 877-78, 787 S.E.2d at 820 (citations omitted). Obviously I do not believe the statute meets this demanding standard, and I would hold that N.C.G.S. § 14-225.2(a)(2) "restricts speech, not merely nonexpressive conduct; that this restriction is content based; and that it is not narrowly tailored to the State's asserted interest in protecting [jurors and the judicial process] from the harms of [potential juror intimidation]." *Id.* at 880, 787 S.E.2d at 822. "It is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.' That is what North Carolina has done here. Its law must be held invalid." *Packingham*, 582 U.S. at __, 198 L. Ed. 2d at 283 (citation omitted). I would hold that N.C.G.S. § 14-225.2(a)(2) "violates the First Amendment's guarantee of the freedom of speech." *Bishop*, 368 N.C. at 880, 787 S.E.2d at 822.

II. As Applied

Assuming, *arguendo*, N.C.G.S. § 14-225.2(a)(2) is not unconstitutional on its face, I would hold that it was unconstitutional as applied in the present case. Because I believe the First Amendment is implicated in this case, the actions of Defendant and his associates were protected by the First Amendment absent sufficient evidence that their *actual* conduct demonstrated Defendant had made an agreement with either Dan or Kathryn to communicate a "true threat" to one or more of the six jurors involved, and that they intended to follow through with their intent to intimidate at least one juror at the time the agreement was made. After thoroughly reviewing the trial testimony of all the witnesses, and watching the video footage of the actual interactions between the different parties, I cannot find evidence of conduct reaching the level of a "true threat," or of any conspiracy to communicate such a "true threat."

In the present case, *all six* of the jurors who testified said that the content of Defendant's speech—as well as that of Dan and Kathryn—was limited to the following, or variations thereof: telling the jurors that their verdict was wrong, and that Dan was innocent; telling the jurors that their verdict had ruined Dan's life; telling the jurors that, due to their verdict, Dan would not be able to find a job; and telling the jurors that they hoped the jurors could "sleep well" and "live with themselves." *Every* juror testified that no one in Defendant's party made any statements indicating an intent to physically injure anyone, or an intent to act violently in any manner. *Every* juror testified that none of the physical actions of Defendant or the other parties demonstrated an intent to

physically harm any juror. *Some* jurors did testify that they *felt* intimidated, and that they formed concerns that Defendant, Dan, or Kathryn could, at some later time, try and track them down at their homes and harm them. However, not a single juror could articulate anything concrete that happened at the courthouse in support of their fears that they might be in some future danger at the hands of Defendant, Dan, or Kathryn.

The video does not show any threatening actions by Defendant, Dan, or Kathryn. Every juror explained that their feelings of fear or anxiety were primarily based upon their knowledge that Dan had been in a violent fight in the past (where Dan was badly beaten), that Defendant had been present at that fight, and that Dan had acted belligerently toward the police and others following that fight as they were attempting to aid him. No juror articulated anything that Defendant or the others had done beyond expressing displeasure with the jury verdict in a manner the jurors felt was aggressive and disrespectful. I can find nothing that rose to the level of a "true threat" in the evidence presented at trial.

More importantly to this analysis, the trial court did not give any instructions defining what could constitute a "threat" or "intimidation." Specifically, the instruction given allowed the jury to convict Defendant *without making any determination* that the State proved beyond a reasonable doubt that anything Defendant, Dan, or Kathryn did constituted a "true threat," or that limited any conspiracy to one in which the alleged conspirators intended to communicate any "true threat." *Brandenburg v. Ohio*, 395 U.S. 444, 448–49, 23 L. Ed. 2d 430, 434 (1969) (as applied First Amendment violation found when "[n]either the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action"). In the present case, the jury acquitted Defendant on all the charges requiring proof that Defendant actually "threatened" or "intimidated" the jurors—even under the broad definitions of "threat" and "intimidate" that they were allowed to apply. Because Defendant was convicted based upon his protected speech, and the trial court's instructions *did not require the jury to find a conspiracy to communicate a "true threat"* in order to convict Defendant, I would also find the statute violated Defendant's First Amendment rights as applied to him in this case.

III. Overbreadth

For the reasons articulated above, I would also hold that the statute is facially overbroad under the First Amendment. "According to our First Amendment overbreadth doctrine, a statute is facially invalid if

it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292, 170 L. Ed. 2d 650, 662 (2008) (citation omitted). "[T]he threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *Id.* (citations omitted). "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id.* at 293, 170 L. Ed. 2d at 662. N.C.G.S. § 14-225.2(a)(2) prohibits any person from taking any action that a juror, law enforcement officer, or prosecutor deems to be "threatening" or "intimidating"—including acts of protected speech or expressive conduct—so long as that action is interpreted as having been taken in response to any official action of a juror. The prohibited action may occur at any time, and in any place, and the State need not prove that the person had any intent to "threaten" or "intimidate," only that the action could be interpreted as "threatening" or "intimidating." The amount of protected speech potentially prohibited by the statute is substantial, and I would hold that it "is facially invalid [because] it prohibits a substantial amount of protected speech." *Id.* at 292, 170 L. Ed. 2d at 662. However, I believe a statute could be drafted in such a manner as to pass constitutional muster by including a "true threat" requirement: "[T]his opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission." *Packingham*, 582 U.S. at __, 198 L. Ed. 2d at 281; *Bishop*, 368 N.C. at 878 n.3, 787 S.E.2d at 821 n.3 (citations omitted).

IV. Void for Vagueness

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 75 L. Ed. 2d 903, 909 (1983) (citations omitted). Based on my analysis of the facts and the law above, I would find this statute is void for vagueness. There are many actions that could lead to prosecution under the statute that ordinary people would not understand as prohibited, and would instead understand as an exercise of free speech in response to governmental action. I believe the statute does encourage arbitrary and discriminatory enforcement, including in the present case.

The majority opinion holds that, because this Court found the term "intimidate" was not unconstitutionally vague in *Hines*, 122 N.C.

App. at 552-53, 471 S.E.2d at 114, Defendant's argument fails. However, Defendant's argument is not limited to the definition of "intimidate," and the majority opinion's holding here is predicated on its earlier holding that, even for First Amendment purposes, "threaten" and "intimidate" are not required to be defined as "true threats." Instead, the majority opinion adopts the dictionary definition of "intimidate" as set forth in *Hines*: " 'Intimidate' is commonly defined as 'to make timid or fearful: inspire or affect with fear: frighten.' " *Id.* at 552, 471 S.E.2d at 114 (citation omitted). I do not believe, for example, the statute as written "define[s] the criminal offense with sufficient definiteness that ordinary people can understand" what conduct might make a juror feel "timid" or "fearful;" when or where protest against official action of a juror will be lawful, and when or where such protest will be unlawful; what "official actions" are covered by the statute; or whether any *intent* to "frighten" or "make feel timid" is actually required. *Kolender*, 461 U.S. at 357, 75 L. Ed. 2d at 909.

V. Jury Instruction

I would hold that the trial court erred in denying Defendant's request for jury instructions properly defining "intimidation." There was considerable confusion at the charge conference concerning what specific words would be included in the instruction because the pattern instruction is actually an instruction for N.C.G.S. § 14-225.2(a)(1) with a footnote stating: "This instruction deals with harassing, intimidating, or communicating with a prospective or sitting juror as defined in G.S. 14-225.2(a)(1). For threatening or intimidating a former juror as defined in G.S. 14-225.2(a)(2) amend the charge accordingly." N.C.P.I. – Crim. 230.60. The State made a last minute request to change its written request from simply "intimidating" to "threatening or intimidating." Defendant had come to the charge conference with two written alternative proposals to add to the pattern instruction, one of which stated: "Regarding the term intimidate, the State would be required to prove that [D]efendant means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. *See State v. Bishop*, __ N.C. __, 787 S.E.2d 814, FN3 (2016)." Defendant's attorney argued that defining "intimidate" was required "in order to find the statute constitutional[.]"[6] The trial court

6. I also note that Defendant's attorney asked for an instruction on specific intent, and requested that the instruction conform to the language of the indictment, which stated that Defendant "did threaten and intimidate" the jurors, not that Defendant "threatened or intimidated" the jurors. The trial court also denied those requests, but Defendant does not argue those issues on appeal.

denied Defendant's request, and instructed the jury without any definition of "threaten" or "intimidation," and without any requirement that the evidence demonstrated that Defendant conspired with either Dan or Kathryn to communicate a "true threat," as follows:

> [D]efendant has been charged with threatening and or intimidating a juror. Now I charge that for you to find [D]efendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that a person had served as a juror and had just been discharged from that jury service. Second, that [D]efendant threatened and/or intimidated that person. And, third, that [D]efendant threatened and/or intimidated that former juror as a result of a prior official action of that person as a juror.
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date a person had served as a juror, and had been discharged from that jury service as a juror, and that [D]efendant threatened and/or intimidated that person, and that [D]efendant intended thereby to threaten and/or intimidate that person as a result of a prior official action of that person as a juror, it would be your duty to return a verdict of guilty.[7]

The trial court's denial of the requested instruction allowed the jury to convict Defendant on a theory that, in response to Dan's verdict, he conspired with another person " 'to make timid or fearful: inspire or affect with fear: [or] frighten' " a juror, *Hines*, 122 N.C. App. at 552, 471 S.E.2d at 114 (citation omitted)—instead of requiring the State to prove that the conspiratorial intent of Defendant and another was to communicate a "true threat" as required by the First Amendment. I would vacate Defendant's conviction on this basis as well.

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7. I note in the first paragraph, where the trial court is laying out the elements of the crime, it included no scienter element. The instruction as rephrased in the second paragraph seems to include an element of intent; however, based upon the charge conference and the first paragraph of the instruction, I read "intended thereby" to mean that Defendant had to intend for his "threatening or intimidating" actions to be in response to the juror's prior service. The Ninth Circuit, reviewing Supreme Court cases, has held: "We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *U.S. v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) (footnote omitted). For federal criminal statutes, the United States Supreme Court requires proof that a defendant *intended* his communication to be perceived as a true threat. *Elonis*, 575 U.S. at __, 192 L. Ed. 2d at 16-17.

VI. Conspiracy

I would first hold that Defendant's motion to dismiss the conspiracy charge should have been granted because there was no evidence presented that Defendant made an agreement with anyone to communicate a "true threat" to any juror. However, even absent consideration of the constitutional issues discussed above, I do not believe there was sufficient evidence presented at trial to support the charge of conspiracy even under the majority opinion's reasoning. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (citations omitted).

The State was required to prove that Defendant, along with either Dan or Kathryn, made an agreement to harass at least one juror by threats or intimidation, and that the conspirators "intended the agreement to be carried out at the time it was made." *State v. Euceda-Valle*, 182 N.C. App. 268, 276, 641 S.E.2d 858, 864 (2007) (citations and quotation marks omitted). I disagree with the majority opinion's contention that Defendant's argument "that the State presented insufficient evidence that he intended 'to threaten or menace any juror' " is irrelevant to the conspiracy charge. While it is true that there is nothing inconsistent or improper when a jury convicts on a conspiracy charge but acquits on the underlying criminal charge—*each co-conspirator must actually form the intent to commit the underlying offense before they can conspire with one another to commit that offense*. *Id*. As the trial court correctly instructed, it was the State's burden to prove that Defendant and any co-conspirator "*intended at the time the agreement was made that it would be carried out*[.]" (Emphasis added). Finally, "[w]hile conspiracy can be proved by inferences and circumstantial evidence, it cannot be established by a mere suspicion, *nor does a mere relationship between the parties or association show a conspiracy*." *Id*. (citations and quotation marks omitted) (emphasis added); *see also State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229–30 (2000) (citation omitted) ("If, however, the evidence 'is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.' "). I find the evidence of conspiracy in the present case amounts to nothing more than mere suspicion or conjecture based upon the relationship between the alleged conspirators and the fact that they were together when they expressed to the jurors their disagreement with Dan's conviction.

First, the State conceded at trial that no conspiracy occurred while Defendant, Dan, or Kathryn were still inside the courtroom.[8] As the State argued in its closing: "I'm not saying they planned it beforehand. I'm saying they acted on it when they got out into the lobby[.]" Therefore, I review the evidence from the "lobby," or common area right outside the courtroom. For a significant amount of time, Defendant was alone in the lobby. Rose Nelson ("Nelson") was the first juror to leave the courtroom, but there could not have been any conspiracy to intimidate Nelson, because she left the courtroom before Dan or Kathryn joined Defendant in the lobby. None of Defendant's interactions between jurors Kinney Baughman ("Baughman"), William Dacchille ("Dacchille"), Denise Mullis ("Mullis"), or Lorraine Ratchford ("Ratchford"), as they exited the hallway and walked to the jury room, could have constituted evidence of a conspiracy either—for the same reason: Dan and Kathryn were still in the courtroom at that time. Therefore, during these initial confrontations, when Defendant was alone, Defendant had already formed the intent, and acted upon that intent, to tell the jurors things like "he hoped that [Nelson] could live with [herself] because [she] had convicted an innocent man, and then as [Nelson] was making [her] way to the stairs trying to get down the stairs, he was saying something about the crooked Boone police, and he hoped that [she] slept well[;]" that Dan was "an innocent man, he's an innocent man[;]" that "[Mullis] got it wrong, that [she] made a mistake[;]" and "congratulations, you [Ratchford] just ruined [Dan's] life." The jury determined that these actions did not constitute "threatening" or "intimidating" the jurors even under the broad definitions of these terms allowed by the trial court. Dacchille and Ratchford testified that they did not have any further disturbing interactions with Defendant and, therefore, they had no such interactions after Dan and Kathryn had joined Defendant. Mullis testified that while she was in the jury room she "could hear voices," but "didn't know what was being said[,]" and that nobody said anything to her as she left the jury room and entered the stairwell.

The only juror to actually engage with the family in the lobby—as opposed to silently walking past Defendant, Dan, and Kathryn while leaving the lobby—was Baughman. Baughman was in the jury room—with Dacchille, Mullis, and Ratchford—when first Kathryn, followed by Defendant's and Dan's mother ("Ms. Mylett"), then Dan, exited the courtroom and joined Defendant in the lobby.[9] Kathryn was crying as she

8. In order to fully review the relevant events, it is necessary to watch the video.

9. I note that the reason Defendant, Dan, Kathryn, and Ms. Mylett remained in the lobby during the period that followed appears to be that they were waiting for Dan's

left the courtroom and walked around the open courtroom door toward Defendant, who was standing still with his back to the courtroom wall. There was a period of less than one second when Kathryn's face was facing in Defendant's direction, and Defendant clearly noticed Kathryn was upset. Defendant immediately approached her to place his hand on her head, then her back, in what appeared to be a consoling gesture, as she walked in a semicircle and stood with her face inches away from the exterior wall of the courtroom.

The video shows that this approximately one-second period when Defendant saw that Kathryn was crying was the only moment Defendant could have made eye contact with her during the time period from when she joined Defendant in the lobby and Baughman's exit from the lobby—when Baughman entered the stairwell. Defendant *never* made eye contact with Dan or appeared to communicate with him in any manner during this period of time. There is nothing about the interaction between Defendant and Kathryn that suggests Defendant was doing anything other than trying to console her. I do not believe any other possible inference rises above the level of speculation or conjecture. Seconds after leaving the courtroom, Dan appeared to notice Baughman as he was walking out of the jury room, and Dan walked several steps toward the jury room door. He stopped when he was approximately seven to eight feet away from the jury room door, just as Baughman was emerging. Ms. Mylett was behind Dan, and Kathryn was still near the courtroom wall, but she then started walking toward Baughman. Defendant walked behind Ms. Mylett and stood a couple of feet behind his brother as Baughman walked by first Dan, then Ms. Mylett, then Kathryn. From the time Baughman entered the lobby, the attention and focus of Defendant, Dan, Kathryn—and Ms. Mylett—was almost exclusively on Baughman. The video does not show any discernible interaction between Defendant and anyone other than Baughman—there is no video evidence that Defendant interacted with Dan or Kathryn after his initial, brief contact with Kathryn.

From the video, it appears that Dan and Kathryn began talking to Baughman right as Baughman began to walk past them, and Dan stepped back and away from Baughman to make more room for Baughman to pass by him. Defendant was behind Dan, approximately five feet away from Baughman, and Baughman continued and walked past Ms. Mylett, then Kathryn. It is unclear from the video whether Defendant or

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attorney to finish up in the courtroom and join them. Once Dan's attorney exited the courtroom and joined them in the lobby, they all immediately left the courthouse together.

Ms. Mylett were engaging with Baughman at this time, but Baughman testified that Defendant spoke to him as he initially walked past the family, saying "that his brother was an innocent man, that [Baughman] had done wrong." The attention of Defendant, Dan, and Kathryn was constantly focused on Baughman throughout this encounter; they were never in positions to make eye contact with each other, and they did not touch each other. Logically, by this time—when Defendant, Dan, and Kathryn had all begun to express their frustration over the verdict with Baughman—the conspiracy to intimidate jurors—if any—would have already been committed. The actions of Defendant, Dan, and Kathryn following this initial confrontation were simply a continuation of what had already begun, and add little to the sufficiency analysis for the conspiracy charge.

Baughman first testified that the family "surrounded" him, but upon watching the video, he agreed: "Not surround me. They were grouped there in front of me as I was coming out of the room." Both Dan and Defendant had their hands in their pants pockets as Baughman walked past them, and Kathryn was holding the shoulder strap of a leather bag with both hands. Baughman further testified that Kathryn "pounced" on him and was telling him "but you convicted [Dan], you sent him to jail, you ruined his life and it's all your fault." Baughman testified that Dan "did a lot of shaking of his head." When Baughman was first confronted after leaving the jury room, Dacchille, Ratchford, and Mullis were still in the jury room. None of them could hear what was being said except Ratchford, who testified that she heard Kathryn "screaming [Dan will] never get a job." Dacchille walked from the jury room directly to the stairwell while Baughman was still in the lobby, but nobody engaged him.

Baughman kept walking toward the hallway, and neither Defendant nor Dan moved at all from where they had been standing. Kathryn walked away from Baughman. From the video, Kathryn was the most animated, but her most animated actions occurred when she was on the opposite side of the room from Baughman. Baughman was nearing the hallway when he stopped, turned, and engaged with Defendant, who was saying something to him. Baughman then walked toward Defendant, and engaged in a brief conversation with him. Baughman testified as to the reason he engaged with Defendant, stating "you know, I'm a former professor, I like to explain things." Baughman was trying to explain to Defendant why the jury reached the verdict that it had reached, but Defendant and Kathryn were interrupting him to say that Dan was innocent. Baughman then decided to walk to the stairwell, instead of down the hallway, so he again walked across the lobby and past the family. It

appears that Defendant and Kathryn continued to argue with Baughman as Baughman walked by and into the stairwell. Defendant, Kathryn, and Dan all moved *away* from Baughman as he passed by, insuring that Baughman's path out of the lobby was not blocked. From the video evidence, there is nothing suggesting Defendant, Dan, or Kathryn had communicated with each other in any manner during this relevant period,[10] much less conspired to harass Baughman. Although conspiracy does not require the commission of the underlying crime, the fact that Defendant, Dan, and Kathryn clearly moved away from Baughman whenever he was trying to walk past them was certainly not evidence that could have been reasonably interpreted as *supporting* the conspiracy charge.

There was also no testimonial evidence suggesting any conspiracy to threaten or intimidate. When the State asked what tone of voice Defendant was using at this time, Baughman testified: "Well, it's firm, but, I mean, he's not yelling at me here. So the way I recall was, [Defendant was saying] my brother was innocent, he's an innocent man, and, you know, we had done wrong. In this case, you know, I'd done -- you done wrong." Baughman testified that Defendant was not raising his voice, but that he was talking in a tone that was "not pleasant[,]" and that Defendant "was clearly upset about the verdict." Baughman testified that during the encounter he "didn't feel physically confronted[,]" or that anyone was "about to inflict violence" on him—that he "didn't feel like anybody was going to attack me here that day[.]" Concerning his interactions with the family, the State asked Baughman: "Had you ever had a quote-unquote discussion like this before?" Baughman answered that he had not in this particular context where his "civic duty" and "the law is concerned," but that "I think probably we've all been in animated discussions before." Baughman further testified that he never heard anyone talking about wanting to intimidate the jurors in any manner. *Every* other juror also testified that they did not hear Defendant conspiring with Dan or Kathryn, and none of them testified that they witnessed any actions that they believed indicated any such conspiracy, or that they believed any such conspiracy existed. It was the State's burden to elicit testimony from the jurors that could support the conspiracy charge, and I do not believe that burden was met.

I do not believe that Baughman's testimony or the video evidence provides evidence from which a conspiracy can be reasonably inferred. Baughman's testimony was that he engaged in debate about the verdict

10. Other than when Defendant briefly placed his hand on Kathryn as she cried by the courtroom wall.

with Defendant, who was arguing that Dan was innocent; that Kathryn was the only one who raised her voice; and that Dan did not engage verbally as much—he mainly just shook his head. Baughman did *not* give any testimony that Defendant engaged in any conduct associated directly with either Dan or Kathryn beyond the mere fact that they were all in the lobby together as they expressed to him their disagreement with the verdict. Baughman *did* testify that he did *not* feel that he was being threatened, that he had been in "similarly animated discussions" in other contexts, and that he did not hear anything that would suggest Defendant was conspiring with anyone to threaten or intimidate him. Further, nothing in Baughman's testimony suggested that he observed any non-verbal conduct suggesting any such conspiracy. As discussed above, I also believe the video evidence fails to provide competent evidence of a conspiracy between Defendant and Dan or Kathryn. I do not believe Baughman's testimony concerning fear he allegedly felt *after* he had left the courthouse adds anything to the State's conspiracy case. Because the totality of "the evidence [wa]s sufficient only to raise a suspicion or conjecture as to . . . the commission of the offense" I believe "the motion to dismiss [should have been] allowed." *Golphin*, 352 N.C. at 458, 533 S.E.2d at 229–30 (citation omitted).[11]

11. Although I believe the critical period is limited to the time leading up to the initial group confrontation with Baughman, I would also hold, considering all the evidence, that the evidence was insufficient to survive Defendant's motion to dismiss with respect to any of the jurors individually, or with respect to "the jurors," in part, or as a whole.

STATE v. ROYSTER

[262 N.C. App. 701 (2018)]

STATE OF NORTH CAROLINA
v.
RONTEL VINCAE ROYSTER

No. COA18-2

Filed 4 December 2018

Drugs—trafficking in cocaine—possession—sufficiency of evidence

In a prosecution for trafficking in cocaine by possession, the State failed to offer substantial evidence that defendant knowingly possessed over 400 grams of cocaine which was discovered in a black box eighteen hours after defendant handed over the closed box in exchange for the return of his kidnapped father.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 4 October 2016 by Judge James E. Hardin, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Geeta N. Kapur and James D. Williams, Jr., for defendant.

ELMORE, Judge.

Defendant Rontel Vincae Royster appeals from judgment entered upon a jury verdict finding him guilty of trafficking in cocaine by possession pursuant to N.C. Gen. Stat. § 90-95(h)(3)(c). On appeal, defendant contends the trial court erred in denying his motion to dismiss the trafficking charge because the State failed to sufficiently prove that he knowingly possessed cocaine found in a black box in a wooded area approximately eighteen hours after defendant allegedly produced the same box in exchange for his kidnapped father. We agree and vacate defendant's conviction accordingly.

I. Background

On 6 July 2015, a grand jury indicted defendant for trafficking in cocaine based on his alleged possession of 400 grams or more of the substance on 29 December 2013. The evidence presented at defendant's 2016 trial tended to show the following.

On the evening of 28 December 2013, Humberto Anzaldo was visiting friends at the Otter Creek Mobile Home Park when he observed a heated argument between two men known as Polo and Scrappy about the loss of $150,000.00. Anzaldo overheard the men discuss kidnapping someone, and he later observed Polo, Scrappy, and a man named Hector Lopez leave the trailer park in a gray two-door BMW.

Defendant's father, Ronald Royster ("Mr. Royster"), testified that two or three Hispanic men came to his home looking for defendant that same evening. The men entered Mr. Royster's home, asked if he had spoken with defendant, put a gun to Mr. Royster's head, and tied his hands together with a cord. The men then led Mr. Royster to a gray two-door BMW, blindfolded him, and drove him to an unknown location, which he later learned to be the Otter Creek Mobile Home Park. Upon arriving at the trailer park, the men phoned defendant and allowed Mr. Royster to speak with him. Mr. Royster told defendant, "I don't know what's going on; you need to come and talk to them."

Sometime the next morning, defendant and a man named Demarcus Cates arrived at the trailer park in a white car. Polo, Lopez, and Anzaldo approached the two men as they exited the car, while Scrappy led Mr. Royster out of a trailer and into the car. According to Anzaldo, defendant produced a black box that was first handed to Cates, passed around, and eventually given to Scrappy. None of the men looked inside the box during this exchange, and Anzaldo specifically testified that he did not know what was in the box on 29 December 2013.

Shortly after the exchange, an argument broke out between Cates and Polo. Anzaldo observed the two men yelling and shoving each other before he heard gunshots and ran to the back of one of the trailers. Scrappy, while still holding the box, also ran from the shooting and into the woods behind the trailer park. Defendant, Cates, and Mr. Royster left the trailer park, and Polo died shortly thereafter as a result of multiple gunshot wounds to the head.

On the morning of 30 December 2018—approximately eighteen hours after the shooting—law enforcement deployed eight K-9 units to perform a grid search of the wooded area behind the trailer park. Fifty to seventy-five yards into the woods, officers discovered a black box containing a large amount of cocaine. The box was completely dry despite the heavy rain from the previous night, and a mason jar containing additional cocaine was found nearby. The mason jar was also dry.

At the close of the State's evidence, defendant moved to dismiss the trafficking charge on the basis that the State had failed to prove the

essential element of possession under N.C. Gen. Stat. § 90-95(h)(3)(c). Defense counsel specifically argued

> that the definition of possession, either actual or constructive, part of that definition is that the defendant must knowingly possess the substance; must be aware of its presence. And there is absolutely no evidence, at this point, that this Defendant was aware, in any fashion, of the contents of that box. . . . . Along with that, by [the box] not being found until 18 or so hours later, the last that we know it is in the possession of some individual by the name of Scrappy. . . . [T]he State has not been able to produce any evidence of what occurred between the time that [Scrappy] took possession of the box and the time it was found the next morning in a totally different location.

In denying defendant's motion to dismiss, the trial court explained that "the State is entitled to all reasonable inferences."[1]

Defendant chose not to testify on his own behalf, but offered evidence in the form of testimony from one law enforcement officer who had been dispatched to the trailer park on 30 December 2013. The officer indicated that Anzaldo had given several inconsistent statements during the course of the investigation, and he reiterated that the box of cocaine was found to be completely dry even though it had rained heavily on the night of 29 December 2013.

At the close of all the evidence, defendant renewed his motion to dismiss the trafficking charge, which the trial court again denied. Following the jury's guilty verdict, the trial court sentenced defendant to 175 to 222 months' imprisonment. Defendant appeals.

II. Discussion

In his sole argument on appeal, defendant contends the State failed to offer substantial evidence that he knowingly possessed a certain amount of cocaine on 29 December 2013. Defendant emphasizes that "none of the State's witnesses testified about what was in the box" on that date and that "[e]ven the State's key eyewitness, Humberto Anzaldo,

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1. Co-defendant Cates was tried separately and convicted of voluntary manslaughter in November 2015. *See State v. Cates*, ___ N.C. App. ___, 799 S.E.2d 279, 2017 WL 1650090 (2017) (unpublished). At the conclusion of the State's evidence in that trial, Judge Michael O'Foghludha granted Cates' motion to dismiss the charge of trafficking in cocaine by possession.

testified that he never looked in the black box on December 29, 2013 and didn't know what was in it." Thus, according to defendant, the trial court erred in denying his motion to dismiss the trafficking charge for insufficient evidence. We agree.

"On a motion to dismiss for insufficient evidence, '[t]he question for the court is whether substantial evidence—direct, circumstantial, or both—supports each element of the offense charged and defendant's perpetration of that offense.' " *State v. Butler*, 147 N.C. App. 1, 9-10, 556 S.E.2d 304, 310 (2001) (quoting *State v. McCullers*, 341 N.C. 19, 29, 460 S.E.2d 163, 168 (1995)). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Rouse*, 198 N.C. App. 378, 381, 679 S.E.2d 520, 523 (2009). "Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996). However, if the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. This is true even though the suspicion so aroused by the evidence is strong." *In re Vinson*, 298 N.C. 640, 656–57, 260 S.E.2d 591, 602 (1979) (citations omitted). "The denial of a motion to dismiss for insufficient evidence is a question of law, which we review *de novo*." *Rouse*, 198 N.C. App. at 381-82, 679 S.E.2d at 523 (citations omitted).

Pursuant to N.C. Gen. Stat. § 90-95(h)(3), any person who "possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as 'trafficking in cocaine[.]' " Additionally,

> if the quantity of such substance or mixture involved:
>
> . . . .
>
> c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 222 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

N.C. Gen. Stat. § 90-95(h)(3)(c) (2017).

In the instant case, the State asserts that "there was substantial evidence showing that on the day of the shooting, 29 December 2013, Defendant possessed the black lockbox and that it contained 400 grams or more of cocaine." As to evidence of the exact contents of the box

on that date, the State cites to (1) the heated argument between Polo and Scrappy on the evening of 28 December 2013, (2) the kidnapping of defendant's father that same evening, (3) defendant's production of a closed black box in exchange for his father on the morning of 29 December 2013, and (4) the discovery of a black box containing at least 996 grams of cocaine in the woods on the morning of 30 December 2013. While we agree that this sequence of events raises a suspicion as to the commission of the offense charged, we conclude that it is just that: a suspicion. Thus, we hold that the trial court erred in denying defendant's motion to dismiss.

III. Conclusion

Because the State failed to present substantial evidence that defendant possessed 400 grams or more of cocaine on 29 December 2013, the trial court should have granted defendant's motion to dismiss the charge of trafficking in cocaine by possession, and we vacate defendant's conviction accordingly.

VACATED.

Judge DAVIS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

Defendant was convicted of trafficking cocaine *by possession*. Police found a large quantity of cocaine in a black box abandoned in the woods, the same black box which Defendant gave as ransom to individuals who, the day before, had kidnapped his father. Defendant argues that the trial court should have dismissed the trafficking by possession charge, contending that the lapse of time between the time Defendant possessed the black box and the time police discovered it the next day with cocaine inside was too great to create a reasonable inference that there was cocaine in the box when Defendant possessed it the day before. The majority agrees with Defendant and has ordered the judgment be vacated.

I respectfully dissent for two independent reasons, which I address in turn below. First, Defendant did not preserve his argument on appeal because the basis for his current argument on appeal is not the same as the basis of the argument Defendant made before the trial court. And second, the time lapse from the time Defendant possessed the box and

the time drugs were discovered in the box, given the other evidence, was not too great to foreclose a reasonable inference that drugs were in the box when Defendant possessed the box. That is, while the evidence in some cases may foreclose allowing juries from inferring that drugs found in a container were in the container the day before, or even the hour before, the evidence in *this* case does not foreclose such inference from being made.

I. Waiver of Argument

Defendant has not preserved his "insufficiency of the evidence" argument because the ground for his argument on appeal is different from the ground he argued before the trial court. *See State v. Jones*, 223 N.C. App. 487, 495, 734 S.E.2d 617, 623 (2012), *aff'd*, 367 N.C. 299, 758 S.E.2d 345 (2014) (holding that a defendant, making a motion to dismiss at trial, has preserved the argument only on the ground asserted at trial and that any other grounds to support the argument are waived on appeal).

"Felonious possession of a controlled substance has two essential elements. [1] The substance must be possessed and [2] the substance must be *knowingly* possessed." *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015) (emphasis added). The basis for Defendant's motion *at trial* was based on the second element, whether there was sufficient evidence that Defendant *knew* there was cocaine in the black box when he possessed it. On appeal, though, Defendant's argument is based on the first element, whether there was sufficient evidence that cocaine was, in fact, in the box at the time Defendant possessed it. Therefore, Defendant has not preserved his argument for appeal.

II. There Was Sufficient Evidence To Submit Charge to the Jury

Even assuming that Defendant has preserved his argument, I conclude that Judge Hardin got it right. While the evidence in some cases may foreclose allowing juries from reasonably inferring that drugs found in a container were in the container the day before, or even the hour before, the evidence in *this* case, taken in the light most favorable to the State, did not foreclose such inference from being made by the jury.

To be sure, there was no *direct* evidence that cocaine was in the black box at the time Defendant possessed it: No one testified as to having seen cocaine in the box when Defendant exchanged the box for the safe return of his father. However, I conclude that the circumstantial evidence raised a strong enough inference that cocaine was in the box at that time to allow the jury to make the call. Indeed, in my view the

strongest inference from the circumstantial evidence, taken in the light most favorable to the State, suggests that cocaine was in the box at the time Defendant possessed it. This circumstantial evidence tended to show as follows:

Scrappy complained to Polo that he was upset that he had "lost $160,000 in cocaine to some [] guys," and Scrappy enlisted Polo to help him "straighten that out." That night, he and Polo kidnapped Defendant's father. The next day, Defendant arrived where his father was being held and exchanged the black box, which felt "pretty heavy" to Scrappy, in return for his father. When an argument ensued and gunshots were being fired, Scrappy ran into the woods clinging to the black box. The next day, police found the black box abandoned in the woods with a large quantity of cocaine inside.

Based on the evidence, when viewed in the light most favorable to the State, a juror could reasonably infer that there was cocaine in the black box when Defendant passed it to Scrappy. In my view, it is the strongest inference. It is certainly possible that cocaine was somehow placed in the box *after* Defendant gave it to Scrappy. But it seems unlikely that Scrappy would have left the woods, filled the box with over $100,000 worth of cocaine, returned to the woods near the place of the shooting, and abandoned the box and cocaine. In any event, whether the evidence established Defendant's guilt *beyond a reasonable doubt* was, in my view, a question for each juror to determine, as Judge Hardin ruled. The jurors made their call, and the judgment based on their verdict should stand.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 DECEMBER 2018)

BALDWIN HOMES, INC. v. LE No. 18-285	Washington (17CVS127)	Reversed
IN RE E.W. No. 18-487	Mecklenburg (15JT69)	Affirmed
IN RE M.A.K. No. 18-499	Greene (16JT26) (16JT27)	Affirmed
IN RE N.H. No. 18-493	Buncombe (15JA37)	Affirmed
RATHKAMP v. DANELLO No. 17-760	Mecklenburg (15CVD14421)	Affirm in part; dismiss in part; reverse and remand in part; vacate in part
SHALLOTTE PARTNERS, LLC v. BERKADIA COMMERCIAL MORTG., LLC No. 17-1288	Mecklenburg (14CVS3030)	Affirmed
STATE v. CODY No. 18-503	Guilford (07CRS109840) (07CRS109843)	Affirmed
STATE v. DOWD No. 18-491	Wake (15CRS226278-79) (15CRS226392) (16CRS28)	No Error
STATE v. GOULD No. 18-425	Bertie (13CRS50001-2) (17CRS50)	No Error
STATE v. GRAVES No. 17-1380	Alamance (13CRS52081)	No prejudicial error
STATE v. HASSELL No. 18-345	Craven (14CRS53664-65)	Affirmed
STATE v. JAMISON No. 18-292	Guilford (15CRS79657-61) (15CRS79672-76)	No Plain Error.

STATE v. KRAFT No. 18-330	Forsyth (15CRS40206)	Reversed
STATE v. NGUYEN No. 17-1163	Forsyth (13CRS60074) (13CRS60085) (13CRS7754)	No Prejudicial Error
STATE v. NOBLE No. 18-299	Onslow (15CRS53805)	No Error
STATE v. PAYNE No. 17-1132	Buncombe (14CRS710842-43)	No Error
STATE v. RUDISILL No. 18-464	Catawba (16CRS1220-22) (17CRS103)	No Error In Part, Affirmed In Part.
STATE v. SMITH No. 17-1161	Brunswick (15CRS53194) (15CRS53196)	No prejudicial error.
STATE v. STEPHENS No. 18-363	Randolph (14CRS3032) (14CRS56023)	No Error
WBTV, LLC v. ASHE CTY. No. 18-452	Ashe (17CVS397)	Dismissed
ZAK v. SWEATT No. 18-616	Moore (14CVD1022)	Dismissed

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